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The Laws of the Game

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Analysis

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Not Law

Unlike man, the Scottish Parliament was born in chains.¹ Its legislative competence was limited from the beginning. It has no legislative “*kompetenz-kompetenz*”² for it cannot set the limits of its own power. The United Kingdom Parliament set down the limits of the Scottish Parliament’s legislative competence in the Scotland Act 1998 (“the 1998 Act”).³ In order to preserve the boundaries of competence, the exercise of power by the Scottish Parliament must be supervised and checked if necessary. Hence, the courts are tasked with ensuring the Scottish Parliament does not break free of its chains. In the past year it has been confirmed that it is not only the 1998 Act that empowers the courts to consider whether the Scottish Parliament has acted according to law.⁴ However, the grounds of any common law review appear (the specifics are far from clear) limited.⁵ Thus, the main vehicle for reviewing the Parliament’s actions is the scheme of the 1998 Act, as interpreted by the courts.⁶ If the courts decide that the Scottish Parliament has acted beyond its competence, then the offending provisions are statutorily “not law”.⁷

A. *SALVESEN v RIDDELL*

After more than a decade of devolution without a successful challenge to an Act of the Scottish Parliament, the supreme courts of Scotland have declared twice in the

1 Apologies to Rousseau: J J Rousseau, *The Social Contract* (1761, 1913 reprint by G D H Cole (ed)) 5.

2 See J H H Weiler and U R Haltern, “The autonomy of the community legal order – through the looking glass” (1996) 37 *Harvard International LJ* 411 at 437; N Walker, “The idea of constitutional pluralism” (2002) 65 *MLR* 317 at 349.

3 *Whaley v Lord Advocate* 2000 SC 340 at 348H per Lord President Rodger; *Martin v Most* [2010] UKSC 10, 2010 SC 40 at paras 1-2 per Lord Hope, and para 44 per Lord Walker; *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061 at para 46 per Lord Hope and para 138 per Lord Reed.

4 *Axa* at para 47.

5 *Axa* at paras 136-154 per Lord Reed; cf para 97 per Lord Mance. See C M G Himsworth, “The Supreme Court reviews the review of Acts of the Scottish Parliament” [2012] *PL* 205 at 209-10.

6 *Martin* at para 5.

7 Scotland Act 1998 s 29(1).

space of just over a month that the Scottish Parliament has exceeded its competence. The appeal court of the High Court of Justiciary in *Cameron v Procurator Fiscal for Livingstone*⁸ and the Second Division of the Court of Session in *Salvesen v Riddell*⁹ have done what no Scottish court had previously: both have declared legislation from an elected Parliament to be *ultra vires* and therefore “not law”. This note concentrates on the Court of Session’s decision in *Salvesen*.

In *Salvesen v Riddell* the Second Division held that the Scottish Parliament exceeded its legislative competence by passing section 72 of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”). The Lord Justice Clerk’s opinion suggests that the Parliament exceeded its competence in a fairly spectacular fashion.¹⁰ Although the facts of the case are ostensibly simple, they are splayed across tortuous legislative drafting and convoluted legislative policy processes and reasoning. Mr Salvesen was the owner of a farm in East Lothian. There was a tenancy over the farm, held by a limited partnership. The respondents were the general partners of the limited partnership, and Salvesen’s agent the limited partner. Both the limited partnership and tenancy had commenced in 1992, and both were due to expire on 28 November 2008. Such choreography was to be expected. The limited partnership was the market’s solution to the financial inconveniences imposed on a landlord by protected agricultural tenures.

On 3 February 2003 the limited partner gave notice that the partnership would be dissolved on 28 November 2008, apparently as part of a plan on the part of Salvesen to amalgamate the tenanted land with other agricultural land which he owned and farmed.¹¹ Around this time the Scottish Executive brought forward the Agricultural Holdings (Scotland) Bill.¹² The Bill did not affect existing tenancies. Another event on 3 February 2003 was the publication of Amendment 169 to the Bill to tackle a perceived problem of landlords dissolving limited partnerships to avoid being affected by the Bill.¹³ Amendment 169 would not have affected the immediate case because it was to be effective from 4 February 2003. However, around a month later a stronger amendment proposed that any notice given on or after 16 September 2002 would not end the tenancy if the general partner gave notice to that effect. Furthermore, it would be up to the landlord to apply to the Land Court to demonstrate why the tenancy should not continue. In short, the effect of the later amendment was to place an onus on landlords to demonstrate why they had served a notice of dissolution on or after 16 September 2002. The provision was therefore a retrospective one. These amendments were passed and came to form sections 72 and 73 of the 2003 Act.

8 *Cameron v Procurator Fiscal for Livingstone* [2012] HCJAC 19; [2012] HCJAC 31.

9 *Salvesen v Riddell* [2012] CSIH 26; 2012 GWD 12-234.

10 Despite the controls to ensure legislative competence: Scotland Act 1998 ss 31, 33 and 35.

11 *Salvesen* at para 48.

12 The Bill was introduced into the Parliament on 16 September 2002.

13 *Salvesen* at para 25.

B. INTERPRETING SECTION 72: ORTHODOXY AND CONSTITUTIONAL REVIEW

(1) The court's approach

The Lord Justice Clerk identified four questions in the case to be considered sequentially:¹⁴

- (a) What was the true construction of section 72(9) without taking the jurisprudence of the European Convention on Human Rights into account?
- (b) Was section 72 Convention-compliant?
- (c) If not, was there a construction that could avoid incompatibility with the Convention?
- (d) And if there was not, what would be the appropriate remedy for the court to provide?

(2) Orthodox statutory construction of section 72

In addressing the first of these questions the Lord Justice Clerk observed that section 72 “is not a model of draftsmanship either in structure or in expression”.¹⁵ It is hard to disagree. Section 72(9)(a)(i) states that a landlord must demonstrate that his notice of dissolution was served with a purpose other than depriving a general partner of any right “deriving from” that section. This gives rise to an absurdity, for until 22 April 2003 there was no section for such a right to derive from. Furthermore, the landlord had to apply to demonstrate that notice of dissolution “was served otherwise than for the purposes of depriving any general partner of any right deriving from this section”.¹⁶ Once again a literal interpretation of the provision is problematic: all notices of dissolution are taken with a view to ending a tenancy and depriving the general partner of *any* rights in the subjects. Logically this would mean that *any* notice served by a landlord in the relevant period would fall foul of section 72(9), and thus would render the provision “meaningless”.¹⁷ Accordingly, the court decided that it must look for an underlying purpose other than preventing the acquisition of rights under the legislation and, crucially, such a purpose might be the execution of a pre-existing plan that required dissolution to achieve it. Salvesen’s planned amalgamation of adjacent farmland, if proven, could represent an appropriate reason to serve a notice of dissolution that would allow him to obtain a section 72(8) order.¹⁸

(3) Constitutional review of section 72

The court’s “orthodox” interpretation of section 72 was sufficient to dispose of the case.¹⁹ Arguably of more significance, however, was the question of “constitutional

¹⁴ Para 59.

¹⁵ Para 61.

¹⁶ Agricultural Holdings (Scotland) Act 2003 s 72(9)(a)(i).

¹⁷ *Salvesen* at para 64.

¹⁸ Para 68.

¹⁹ Paras 68-69.

review”: if section 72 was not compatible with the Convention, then it was simply “not law”.²⁰ The challenge to competence rested upon Article 1 of Protocol 1 (invariably known as “A1P1” these days), which protects property rights. A general partner (tenant) could use section 72 to remove the landlord’s rights under a tenancy without compensation and in a retrospective fashion.²¹ In light of this, the court had little difficulty finding that A1P1 was engaged and the nub of the question was whether the 2003 Act pursued a legitimate aim that was addressed proportionately. The court fused the questions of legitimate justification and proportionality together.²² Specifically, the court recognised that providing secure agricultural tenures for tenants and accessory retrospective anti-avoidance measures could be legitimately justified.²³ The important question, therefore, was the extent to which measures calculated to achieve these purposes, i.e. section 72 read alongside section 73, satisfied the requirement of proportionality. While recognising the wide margin of appreciation afforded to national authorities in relation to A1P1,²⁴ the court was of the view that the impugned provisions were clearly disproportionate.

Drawing upon the narrative of the passage of the 2003 Act,²⁵ the court held that potentially justifiable anti-avoidance measures in section 72 were excessive. Instead of seeking to neutralise any attempts to evade the 2003 Act, the section was in fact functionally punitive.²⁶ Effectively imposing a tenancy on the landlord (under the Agricultural Holdings (Scotland) Act 1991) ignored less intrusive anti-avoidance measures.²⁷ Furthermore, the temporal effect of the section was arbitrary: any notice given between 16 September 2002 and 30 June 2003 was affected, regardless of the period of notice. The arbitrary time period also created unwarranted “discrimination” in the sense that a landlord serving notice on or after 1 July 2003 *could* end a tenancy under section 73.²⁸ Taken alone these failings would be sufficient to find that the impugned provisions were disproportionate and, therefore, section 72 was beyond the Parliament’s competence.²⁹ In addition, a latent justification that general partners deserved protection from the dissolution of partnerships *per se* was so illogical as to constitute a punitive action.³⁰ In the present case the landlord’s actions were in accordance with the law and would not have been motivated by law reform proposals that would have been unknown to him. Accordingly, it was disproportionate to apply a punitive anti-avoidance measure to him.³¹

20 Scotland Act 1998 s29(1) and s29(2)(d).

21 *Salvesen* at paras 72-73.

22 Para 76.

23 Para 75.

24 Paras 77-78.

25 See A above.

26 Paras 80-81.

27 Para 82.

28 Para 84.

29 Paras 97-98.

30 Paras 90-91.

31 Para 95.

C. CONCLUSION

In the absence of a determined remedial approach from the court, it is not clear how far the court will go in “striking down” the settled will of the Parliament. As the court itself said,³² “the constitutional question now overhangs this case”. Ultimately, the decision in *Salvesen* is important because it is symbolic. It represents the first time that the Court of Session has determined that the Scottish Parliament stepped beyond its constitutional powers and, taken alongside the *Cameron*³³ decisions, may signal a more assertive role for the Scottish courts. The Judicial Committee of the Privy Council and its successor, the Supreme Court, have not been reticent in their application of Convention jurisprudence to domestic law, including Scots law. The Scottish courts have arguably been more conservative in their approach to Convention jurisprudence up until now. That may be about to change. The past year has seen a number of challenges to Acts of the Scottish Parliament,³⁴ and there is no obvious reason for that trend to diminish. The reality of governing with judges has come to Scotland.³⁵ The judges are no longer lurking over the legislative shoulder,³⁶ rather they are standing front and centre, and it is they who hold the keys to competence.

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(The author is grateful to Paul Reid for comments on an earlier draft.)

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The Laws of the Game

I have no interest in football. Yet who, living in Scotland, could not be interested in *l'affaire Rangers*? It is like one of those luxuriant exam problems that seem, to the terror of students, to pack in every conceivable legal issue, concluding with the imperative “discuss” or, before Latin was shunned as elitist, the interrogative “*quid juris?*” As I write, in June 2012, *l'affaire* rumbles on, new developments being reported almost every day. So far there have been two decided cases, though others may follow, perhaps criminal as well as civil. The first case is *Joint Administrators of Rangers Football Club Plc, Noters*¹ and only that case is discussed here.²

³² Para 107.

³³ See n 8 above.

³⁴ *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061; *Sinclair Collis Ltd v Lord Advocate* 2011 SLT 620.

³⁵ A Stone Sweet, *Governing with Judges* (2000); J L Hiebert, “Governing under the Human Rights Act: the limitations of wishful thinking” [2012] PL 27.

³⁶ M Walters and P Craig, “The courts, devolution and judicial review” [1999] PL 274 at 303.

¹ [2012] CSOH 55.

² The other is Lord Glennie’s quashing of the Scottish Football Association “transfer embargo”: *Rangers Football Club plc, Petitioner* [2012] CSOH 95. There are also ongoing tax cases.

As everyone knows, in 2011 Sir David Murray sold Rangers to Craig Whyte for £1. Everyone is doubly wrong. Murray did not sell. And Whyte did not buy. The owner was and is Rangers Football Club plc (“RFC”).³ Murray was not the owner of RFC. The owner was Murray MHL Ltd (“MHL”). The buyer was Wavetower Ltd, later renamed Rangers FC Group Ltd (“Group”), an English company. Perhaps Whyte owned Group? No. Group’s owner was Liberty Capital Ltd (“Liberty”), a British Virgin Islands company. Seemingly Whyte owns Liberty. MHL sold its RFC shares to Group for £1, but Group undertook further obligations, including an obligation “to fund the reasonably foreseeable ongoing working capital requirements” of RFC,⁴ and to make an immediate “contribution” to RFC of £5m.⁵ Moreover, Group declared that it intended “to invest or procure an investment of a further aggregate amount of £20m”.⁶ RFC was not a party to the takeover contract, but nevertheless the contract provided that RFC “may directly enforce those undertakings in accordance with the Contracts (Rights of Third Parties) Act 1999”.⁷

A. THE TICKETUS DEAL

At the time of the takeover, a large sum was raised from two connected English businesses, Ticketus LLP and Ticketus 2 LLP.⁸ The deal was that Ticketus “bought” several million pounds worth of future season tickets. The tickets were never to be delivered, it seems, but rather RFC was to sell them to fans as agent for Ticketus. There were thus two contracts: the sale contract (future tickets sold by RFC to Ticketus) and an agency contract (future tickets sold by RFC for Ticketus). Moreover, according to the administrators, “Ticketus advanced £20.3m to a Collyer Bristow⁹ client account in the name of RFC Group”,¹⁰ which is puzzling given that the “seller”

3 One could say that RFC does not *own* Rangers but *is* Rangers. But that identity theory sits uneasily with the fact that RFC (incorporated 27 May 1899) is 27 years younger than Rangers. The issue, perhaps merely semantic, will not be discussed here, nor will the precise meaning of “own”.

4 Clause 6.1.3 of the Share Purchase Agreement (“SPA”) of 6 May 2011.

5 SPA clause 6.4.

6 SPA clause 6.5.

7 SPA clause 15.1. Readers will be reassured to know that the SPA says that MHL shall transfer “the legal and beneficial interest in the shares” (clause 2.2), and that “the Law of Property Miscellaneous Provisions Act 1994 shall not apply” (clause 2.4). But then “this agreement is governed by and shall be construed in accordance with English law” (clause 18). Of course.

8 The case treats the two firms as one, and this note will do the same. It is hard to discover much about Ticketus. The Companies House website reveals dozens of firms with this name, all sharing the same address. The website, available at <http://www.ticketus.co.uk/> (whose compliance with the Companies (Trading Disclosures) Regulations 2008 and the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 is not apparent to me), has some information including the instruction that all media enquiries should be addressed to “Luther Pendragon”.

9 The London law firm acting for Group, now being sued by the RFC administrators for around £25 million (see the administrators’ CVA Proposal of 29 May, available at <http://www.rangers.co.uk/staticFiles/c9/b3/0,,5~177097,00.pdf>, para 5.4 ff). But that is another story, or, rather, one of the many other stories, for instance that Ticketus is reported to be claiming around £25 million from Liberty and Whyte.

10 Joint Administrators’ Report to Creditors and Statement of Proposals, dated 5 April 2012, at para 5.6, available at <http://www.rangers.co.uk/staticFiles/fe/a8/0,,5~174334,00.pdf>.

was not Group but RFC. What happened to the money? This is unclear. Some, it seems, was used to pay off the debt owed to Bank of Scotland.¹¹ It is widely rumoured that some of the money was used to finance the acquisition, which, if true, may be contrary to the “financial assistance” rules.¹² Lord Hodge refers to this possibility¹³ but notes that the point was not relevant to the issues before him.

B. THE ADMINISTRATION AND THE APPLICATION FOR DIRECTIONS

RFC was already in financial difficulties. In February 2012 it went into administration. The joint administrators were from Duff & Phelps, a London firm that had already been involved at the time of the Whyte takeover. Much has been said about whether the Duff & Phelps partners should have accepted office and about the conduct of the administration, all of which is outwith the ambit of the present note, except that I cannot forbear to quote one tidbit, penned by the administrators: “The Joint Administrators’ time costs for the period 14 February 2012 up to and including 31 March 2012 totals¹⁴ £1,199,356.”¹⁵

The plan was that RFC should move from an administration to a Company Voluntary Arrangement (CVA), in which all creditors are bound so long as the arrangement is supported by a qualified majority (75%, calculated by value) and by the company itself. One aspect of a CVA is that the company’s juristic personality continues. In corporate insolvency it is common to sell the business to a new company, with the old company being wound up and dissolved. This is often a good approach, but for Rangers it would create the problem that the team currently recognised by professional bodies such as the Scottish Football Association, the team that is in the Premier League and so on, would no longer exist. In that case NewCo would have to start from zero.

The joint administrators applied to the court (Lord Hodge) for:¹⁶

A direction as to the legal nature of the rights which the agreements confer on Ticketus in respect of (i) the Company’s Stadium, and (ii) the proceeds of future sales of season tickets for that Stadium; and a direction as to the legal test which is to be applied by [the] administrators or by the court in determining whether those administrators can be prevented from causing the company to terminate the agreements, albeit in breach of their terms.

The application was under para 63 of Sch B1 of the Insolvency Act 1986 which says, with admirable if challenging concision, that “the administrator of a company

11 It seems that the debt was not extinguished, but that Group bought the debt. The bank thus assigned the debt, and also the floating charge securing it. On the other hand, it is also reported that the floating charge now secures nothing: see Schedule 7, note 1, to the CVA Proposal (n 9). The Rangers Club motto is “Ready” but the Rangers Collapse motto should perhaps be *omnia abeunt in mysterium*.

12 Companies Act 2006 s 678.

13 *Joint Administrators* at para 16.

14 *Sic*.

15 *Joint Administrators’ Report* (n 10) para 13.2.

16 *Joint Administrators* at para 9.

may apply to the court for directions in connection with his functions". The idea of seeking "directions" ultimately comes, I would guess, from trust law. I know too little procedural law to evaluate it, but wonder to what extent "directions" can supersede the usual ways in which private law disputes are heard and determined by the courts, such as actions of payment, damages, specific implement, declarators, multiplepointings and so on. And do "directions" lead to *res judicata*? If so, would that apply if the same issues were to be litigated in England? The contracts in question had a clause appointing English law as the substantive law and conferring on the English courts *exclusive* jurisdiction. Can the jurisdiction of the English courts be ousted? I do not know.

C. THE ISSUE OF SPECIFIC IMPLEMENT

We begin with the second issue raised in the application for directions, namely the question of "termination". This word is odd. Lord Hodge was surely right to put the matter thus:¹⁷

[T]he administrators do not have power to terminate a contract in the absence of a contractual power to do so or material breach on the part of the other contracting party. Accordingly, the direction sought is shorthand for a request for a legal test to be applied by the court if, after the administrators had repudiated the Ticketus contracts, it were to be asked to compel the administrators to arrange that Rangers perform its contractual obligations.

In other words, if the contracts were broken, could Ticketus merely claim damages—in which case it would be in the same boat as other creditors—or would specific implement be possible? The basic rule for sequestration and liquidation has always been that specific implement is incompetent. Indeed, much of insolvency law would become meaningless were that not so. Lord Hodge held that the position is the same in administration (with possible qualifications).¹⁸ No doubt that is right. But what if Ticketus were to seek specific performance in the English courts, which have exclusive jurisdiction? The worry is merely theoretical, in part because in practice the English courts would not grant specific performance, and in part because if RFC had gone into a CVA that would presumably have barred Ticketus from seeking specific performance.

D. DID THE CONTRACT CREATE MORE THAN AN ORDINARY PERSONAL RIGHT?

(1) The jurisdictional issue

If the right to future tickets were more than an ordinary personal right that would obviously improve Ticketus' position greatly, while, at the same time, it would make a CVA harder to achieve. Neither the sale contract nor the agency contract said anything about trust. Ticketus produced to the court an opinion obtained from an

¹⁷ *Joint Administrators* at para 39.

¹⁸ Para 62.

English silk, Richard Hacker, saying that under English law the sale contract gave to Ticketus “an intermediate right which was not a property right in the conventional sense but was more than a mere personal right” and that the agency contract “vested the full beneficial title to the sums in Ticketus and left Rangers with a bare legal title”. But was English law applicable? Hence the first part of the application for directions: was this issue to be determined by English law or by Scots law? In so far as Ticketus was claiming a real right, Lord Hodge held that the applicable law had to be Scots law. More difficult was the question of whether English equitable rights might have arisen.

The contracts were subject to English law and Ticketus argued, on the basis of the Contracts (Applicable Law) Act 1990,¹⁹ that “the court should give effect to English law by enforcing the equitable proprietary rights which English law recognised”. That view has been expressed elsewhere but Lord Hodge rejected it:²⁰ “I do not consider that the Rome Convention deals with proprietary rights at all.”

What about the Recognition of Trusts Act 1987,²¹ which applies not only to international cases but also within the UK? The Act says that “a trust shall be governed by the law chosen by the settlor”.²² But it also says that “The Convention does not apply to preliminary issues relating to the validity of. . . acts by virtue of which assets are transferred to the trustee.”²³ Ticketus argued that this was irrelevant, because in this case there was no transfer. Counsel quoted Lewin: “where trusts are created by mere declaration by the owner of the original trust assets, there is no preliminary issue to be decided about the validity of any transfer, there being no transfer”.²⁴ But Lord Hodge noted that the semi-official Overbeck Report had taken a different approach and concluded that Article 4 “does not have the effect of making the law chosen by the settlor the governing law of the steps needed to create the trust”.²⁵ So even if the contracts could be understood as implicitly purporting to create a trust, the question of whether they were successful in doing so was a question for Scots law because the assets in question were Scottish assets. Whether this approach is right is a real poser. What if there had been added a single English asset, worth just £1? Would that mean that the trust would be good for all assets?

(2) The substantive issue

Having held that any question of real rights must be determined by Scots law, Lord Hodge concluded – surely correctly – that the contracts “did not create any real right

19 The reference to the 1990 Act (based on the Rome Contracts Convention) was not challenged but, with respect, the Rome I Regulation now applies as between England and Scotland: see article 4 of the Law Applicable to Contractual Obligations (Scotland) Regulations 2009.

20 *Joint Administrators* at para 28.

21 Giving effect to the Hague Trusts Convention.

22 Sch art 6. There is no reference to the Scottish term (truster).

23 Sch art 4.

24 John Mowbray et al (eds), *Lewin on Trusts*, 18th edn (2008) para 11-63.

25 *Joint Administrators* at para 24.

in the seats”,²⁶ and he went on to comment that²⁷ “there is a clear divide between a real right and a personal right and it has long been established that there is no intermediate right”, citing *Sharp v Thomson* when it was in the Inner House²⁸ and *Burnett’s Trustee v Grainger*.²⁹ This is to be welcomed. What about the trust argument? Lord Hodge held that no trust could have been created because under Scots law no trust can be created without any assets:³⁰

The difficulty which Ticketus faces in asserting a trust over the proceeds of sale of the... tickets is that the proceeds do not yet exist. On the assumption that the Ticketus agreements are sufficient to amount to a declaration by Rangers of a trust over the... tickets and the proceeds of their sale, the non-existence of both is fatal to the creation of a trust.

He noted that there had been academic criticism of the “no assets, no trust” rule,³¹ but nevertheless held that he had to adhere to Inner House authority. So even if the contracts could be interpreted as purporting to create a trust, there was no trust. (But what if there had been even one small existing asset, worth say £1? Would that make the whole “no assets, no trust” issue irrelevant?) Ticketus tried to argue that there can be an assignation of a future right, completed in due course by accretion, citing *Buchanan v Alba Diagnostics*,³² but the attempt was not made strongly and Lord Hodge dismissed it. The argument is of doubtful relevance anyway as there was no assignation to Ticketus. And whilst accretion can effectuate a future transfer on the back of a present purported transfer, that does no more than it says it does. If there is no present transfer there is no present transfer.³³ Lord Hodge concluded that “the legal nature of the rights which Ticketus has in the Ibrox stadium, the season tickets for that stadium and the proceeds of future sales of the season tickets are purely personal contractual rights”.³⁴

Even apart from the “no assets, no trust” argument, it may be that it would have been held that there was no trust on the simple ground that the contracts were silent about trust and that no trust could be implied. This side of the case was not much developed, but that well-known anti-implied-trusts case, *Bank of Scotland v Liquidators of Hutchison Main*,³⁵ was cited with approval.

A final thought about the Ticketus deal. If X has an asset, it can be sold to Y, and X can be agent for Y in a further sale. Such an arrangement may or may not stand up to

26 Para 29.

27 Para 30.

28 1995 SC 455. What happened in that case in the House of Lords is best passed over in polite silence.

29 2004 SC (HL) 19.

30 *Joint Administrators* at para 33.

31 W A Wilson “Romalpa and Trust” 1983 SLT (News) 106; K G C Reid “Trusts and Floating Charges” 1987 SLT (News) 113.

32 2004 SC (HL) 9.

33 See further Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011) para 4.51ff; also R G Anderson, “*Buchanan v Alba Diagnostics*: Accretion of Title and Assignation of Future Patents” (2005) 9 EdinLR 457.

34 *Joint Administrators* at para 63.

35 1914 SC (HL) 1.

challenge in the event of insolvency,³⁶ but at least the conception is fairly clear. And the sale of tickets sounds the same. But is it? A ticket in the hands of the issuing club is not an asset. It is a liability.

E. CONCLUSION

This case involved large and difficult issues of insolvency law, of trust law and of international private law but had to proceed under tight time pressure, and was thus a considerable achievement by the counsel and by the Lord Ordinary. It merits more discussion that can be offered in this brief note. I suspect that it will be frequently cited.

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EdinLR Vol 16 pp 420-425

Bad Character, Bad Answer

To what extent should the Crown¹ be allowed to argue along the following lines: (i) the accused (A) has, in the past, acted in a particular way; (ii) it is thus more likely that A acted in a similar way at the time of the alleged offence; (iii) A is thus more likely to be guilty? This is, roughly, the question that the Scottish Government asked the Scottish Law Commission (SLC) to consider in 2007.² The answer presented in *Similar Fact Evidence and the Moorov Doctrine* (“the Report”)³ is that evidence of the accused’s previous, similar misconduct—including her previous convictions—should be admitted into evidence where it is *relevant* to an issue in the trial.

This note argues that the SLC is right to propose the replacement of the existing rules on this area, but wrong to put important decisions regarding the accused’s prior misconduct in the hands of jurors in solemn cases. Before explaining why the SLC’s idea is a problem, and offering a solution, it is useful to outline briefly the background to the Report.

A. THE NEED FOR REFORM

The law regulating the admissibility of evidence of the accused’s past misconduct is complex and illogical. On the complexity point, there are separate rules for different

36 Cf *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270, where the sale was of computing equipment.

1 The SLC’s proposals presumably apply identically to co-accuseds wishing to adduce evidence of an accused’s prior misconduct. Cf Criminal Justice Act 2003 ss 101(1)(d)-101(1)(e), analysed in R Munday, *Evidence*, 6th edn (2011) paras 7.47-7.104.

2 For the reference’s terms, see Report para 1.1.

3 Scot Law Com No 229, 2012.

types of misconduct evidence (e.g. previous allegations of crime, general character evidence and previous convictions), when the Crown would want to adduce each to show the same thing⁴ (that the accused has a *propensity* towards the type of misconduct alleged against her, making it more likely that she committed the offence charged). These rules are difficult to use or explain to juries. Those familiar with the case law on the “*Moorov* doctrine” (which concerns when one allegation of criminal conduct can corroborate another)⁵ will be aware of how complicated matters can become.⁶

The illogical nature of this area of the law is demonstrated by some of the exceptions to the general rule that the prosecution cannot adduce evidence of the accused’s previous convictions before the judge or jury has returned a verdict.⁷ For instance, if the defence impugns the character of a prosecution witness, the Crown might, theoretically,⁸ be permitted to admit into evidence *the entirety* of the accused’s criminal record, however irrelevant it may be to the offence under consideration.⁹ This makes little sense. Furthermore, it is dangerous insofar as it deprives the finder-of-fact of important evidence concerning prosecution witnesses. The accused will not want to risk her convictions prejudicing her chances of acquittal, and so will be reluctant to undermine prosecution witnesses without very good cause.¹⁰ Again, sensible, logical reform of this area would be advantageous.

The SLC sought initially to follow the law’s present, scattered approach, and deal with different types of misconduct evidence separately. It was, however, convinced by responses to its Discussion Paper¹¹ to look at them holistically.¹²

B. THE SLC’S PROPOSALS

Upon looking at these various rules together, the SLC realised that they shared a common core, and that the law’s complexity could therefore be reduced substantially. Evidence that the accused had acted in the same way on one occasion is potentially relevant to the matter of whether she acted in that way on a later occasion, because it might show a *propensity* towards that type of misconduct.¹³ It should not matter, the SLC explains, whether the accused’s previous misconduct is also charged on the same complaint or indictment (as in *Moorov*-type cases) or has already been the subject

4 The use of previous misconduct solely to undermine the accused’s *credibility* cannot be considered here.

5 *Moorov v HM Advocate* 1930 JC 68.

6 Report ch 6 (which also considers the rules developed following *Howden v HM Advocate* 1994 SCCR 19).

7 Criminal Procedure (Scotland) Act 1995 ss 101(1) (solemn proceedings), 166(3) (summary proceedings). See F Raitt, *Evidence: Principles, Policy and Practice* (2008) paras 12.55-12.90.

8 See *Leggate v HM Advocate* 1988 JC 127.

9 Criminal Procedure (Scotland) Act 1995 ss 266(4)(b) and 270.

10 Report para 1.11.

11 *Similar Fact Evidence and the Moorov Doctrine* (Scot Law Com DP No 145, 2010).

12 Report paras 1.4 and 2.29-2.33.

13 Para 1.10 and ch 5.

of criminal proceedings (as in the case of previous convictions or acquittals): the important thing is always its relevance to the offence under consideration.¹⁴

Accordingly, the Report suggests that the set of statutory and common law rules that have been developed to deal with evidence of the accused's previous misconduct should be abolished. The SLC proposes that, in its stead, the fundamental principles of Scots evidence law should be declared in statute. This would involve, primarily, a definition of *relevance*: evidence that "tends to prove or disprove a fact which is... at issue in proceedings, or... otherwise of consequence in the context of the proceedings as a whole".¹⁵ The SLC then wishes the law to state that "[e]vidence of an accused having committed an offence ('offence A') of the same nature as, or of a similar nature to, the offence with which the accused is charged ('offence B') is relevant to whether the accused committed offence B".¹⁶ Evidence of previous, similar misconduct would thus be relevant and admissible, as the SLC thinks there is no convincing policy reason for its exclusion.

Note that evidence of similar, prior offending *is*, not *may be*, relevant: it does not matter, the SLC thinks, how old the previous misconduct is, whether or not it resulted (or even *could have* resulted)¹⁷ in criminal proceedings, or whether it relates to an offence which – although similar – is not *very much more* serious than that now under consideration.¹⁸ All that matters is that the previous offence that the accused is alleged to have committed is in the same category¹⁹ as that at issue in the instant case (e.g. both are sexual offences) or there is "some other basis" of similarity.²⁰ The accused can only realistically object to the admission of misconduct evidence by arguing that it does not satisfy these criteria, or – if it does – that having the jury consider it would "introduce unjustifiable complexity" into proceedings, or "require the expenditure of a disproportionate amount of time" (in which case the prosecution must show the contrary), or that the misconduct is much more serious than that the offence charged (which the accused must demonstrate).²¹

Through these manoeuvres, the SLC aims to codify the basics of Scots criminal evidence for the first time, and solve what have been deeply problematic questions

14 Para 3.4.

15 See s 1(1) of the (draft) Criminal Evidence (Scotland) Bill appended to the Report.

16 Draft Bill s 4(1).

17 It is unclear what the SLC means here: is the fact that a case could not be brought because of an insufficiency of evidence what matters here, or could evidence of the accused acting in an immoral, but non-criminal, manner be adduced to show the accused's propensity towards criminal conduct? The concept of "bad character" evidence, which the SLC thinks includes such misconduct (Report para 1.5), largely disappears by the end of the Report.

18 Draft Bill s 5. If the misconduct is much more serious, the accused can object to its admission (see below).

19 I am named as a consultee who endorsed this approach to relevance (Report para 7.74). I actually supported the SLC's reasoning in para 7.91 of its Discussion Paper, which recognised that – although offence indicators might be a good indicator of relevance – they might also be too broad (if, for instance, the misconduct was a long time ago, in different circumstances, etc).

20 Draft Bill s 11. See, similarly, Criminal Justice Act 2003 s 103(2).

21 Draft Bill s 7. Parts of the Report (e.g. para 7.102) suggest the SLC wanted the accused to be able to argue that it is not in the "interests of justice" to admit evidence of her substantially more serious previous misconduct, but this is not transposed fully into the Draft Bill.

for the courts and the legislature. Added to these provisions are sections on the admissibility of evidence, and the requirement of corroboration (which, *pace* Lord Carloway, the SLC thinks ought to be retained).²² The SLC thus starts with a specific, difficult, point of evidence and ends up with a simple answer and the nascent first sections of a Scots criminal evidence code.²³

Unfortunately, there is a flaw in the SLC's argument, which tarnishes what is – in many respects – a sensible Report.

C. A PROBLEM AND A SOLUTION

The principal difficulty with the Report's proposals concerns the link between previous misconduct and propensity. Remember, the SLC thinks that previous misconduct is relevant to the accused's guilt *if* it demonstrates a propensity towards a type of offending. The SLC thinks the finder-of-fact should decide whether such a propensity exists.²⁴ In solemn cases, then, the jury will be presented with allegations that the accused has committed an offence in the same category as that now charged. It can then decide what weight to accord to this fact.

This is unfortunate. As the SLC half-remembers by the end of its Report,²⁵ evidence of previous, similar misconduct *might* demonstrate a propensity to act in a certain way and therefore *might* be relevant to the question of guilt for the offence under consideration. It might just as easily not be, if – for instance – there has been a substantial period of time between the allegedly similar incidents (especially if the accused was very young at the time of the first incident),²⁶ and/or they arose in different circumstances, and/or they are few in number.²⁷ In that case, a previous conviction might represent an isolated aberration, rather than a propensity towards a particular type of offending. The same might be true of other incidents of similar conduct that did not result in a conviction. In these cases, the relevance of the accused's misconduct to the question of whether she perpetrated the offence she is accused of evaporates. It would be best for the finder-of-fact to never hear of it, lest the accused be convicted on the basis of her (irrelevant) deplorable past, rather than her (relevant) propensity towards the alleged incident of culpable wrongdoing.

Obviously, the best that can be hoped for in *summary* trials is that the judge disregards such evidence,²⁸ but it is possible to ensure that juries never hear of evidence of misconduct which forms a weak or non-existent basis for establishing

22 Report para 1.24. See Lord Carloway, *The Carloway Review: Report and Recommendations* (2011) ch 7.

23 The SLC's last attempt at codifying the law of evidence ended in failure. The sole practical effect was the abolition of the corroboration requirement in civil cases: *Proposals for Reform of the Law of Evidence Relating to Corroboration* (Scot Law Com No 4, 1967); Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 s 9. See now the Civil Evidence (Scotland) Act 1988 s 1.

24 Report paras 5.72-5.75 and 7.90.

25 Compare Report paras 1.10, 5.17 (recommendation 9) and 6.79.

26 Cf Criminal Justice Act 2003 s 108.

27 See Report paras 5.63-5.64 and 7.68.

28 Assuming it would not be feasible to have a separate judge consider questions of admissibility in summary trials.

a propensity towards offending. The trial judge could play a gatekeeping role over evidence of prior misconduct in solemn trials. The Criminal Justice Act 2003, which regulates the admissibility of bad character evidence in English law,²⁹ prevents previous convictions from demonstrating a propensity towards offending (at least where the prosecution is concerned)³⁰ “if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust” to do so.³¹ This is backed up by a duty on the court to exclude previous misconduct evidence if it “would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”³² (a beefed up version of the trial judge’s general power to exclude “unfair” evidence from English trials).³³ In cases where the evidence of propensity is particularly dubious, the jury can thus be prevented from being prejudiced by it.

It would be beneficial (and simple) to have similar mechanisms in any Scottish statute based on the SLC’s proposals. Legislation could make clear that the prosecution must—before the evidence of the accused’s misconduct is admitted—persuade the trial judge that the evidence is capable of showing a propensity towards the offence charged, and that the prejudice caused to the accused by such evidence will not result in unfairness. The legislature could—were it felt necessary—set out some factors, such as the time since the misconduct, or the circumstances of each incident, for the court to consider when looking at these matters.

The main benefits of this proposal would be twofold. First, it ensures the jury does not have to do a judge’s job. If misconduct cannot, for some reason, demonstrate a propensity towards a particular type of criminal offending, then it is irrelevant evidence. It ought, therefore, to be excluded.³⁴ Judges exclude evidence; not juries.³⁵

Secondly, it would be easier to challenge decisions regarding the relevance of the accused’s misconduct if judges made them. Juries do not give reasons for their decisions and nobody is allowed to inquire into their deliberations.³⁶ This makes jury decisions opaque and virtually impervious to challenge.³⁷ If the trial judge had to decide on the presence, or not, of propensity, she would be able to give reasons for her decision³⁸ which would hopefully be transparent and open to challenge by either the prosecution or the defence.³⁹

29 See J R Spencer, *Evidence of Bad Character*, 2nd edn (2009).

30 See n 1 above.

31 Criminal Justice Act 2003 s 103(3).

32 Criminal Justice Act 2003 s 101(3).

33 Police and Criminal Evidence Act 1984 s 78.

34 Draft Bill s 1(3).

35 See e.g. *Thompson v Crowe* 2000 JC 173 (a case not cited in the Report). Cf Report para 3.11.

36 It might not even be possible to do so legally—see the Contempt of Court Act 1981 s 8.

37 See F Stark, “A perfectly unreasonable decision: *Jenkins v HM Advocate*” (2012) 16 EdinLR 86.

38 English judges are required to give reasons for their decisions on evidence of bad character: Criminal Justice Act 2003 s 110.

39 There is not room here to consider the approach that the appeal court ought to take towards such challenges.

D. FAITH IN JURIES, DISTRUST OF JUDGES

From the Report, it is clear that the SLC would object to the proposal above for two main reasons. First, the SLC thinks that concerns regarding jurors' abilities to deal with similar fact evidence are unfounded.⁴⁰ The reasons for this faith range from the banal (juries (members of the public) enjoy popular support (from members of the public))⁴¹ to the more plausible (one study of the jury system in Scotland suggests it operates fairly).⁴² Whatever the merits of these reasons, the SLC simply cannot claim that it knows how juries *really* think about matters such as propensity.⁴³ Furthermore, the Report does not address the difficulties pointed to above about the transparency and accountability of decision-making, asserting simply that judicial directions are effective and followed well by jurors.⁴⁴

A second possible objection to the suggested gatekeeping role for trial judges is that they might encounter difficulty in ascertaining propensity, and revert to *Moorov*-esque hair-splitting, which the SLC rightly criticises as overcomplicated in its Report.⁴⁵ It is therefore preferable, this argument runs, to let a jury deal with that question for itself: it should hear all of the evidence of the accused's similar misconduct (whether this is "similar" because it constitutes an offence in the same category or for "some other reason") and then pick and choose between the parts that are, and are not, relevant to the matter of the her guilt. This would avoid complicated legal argument and tortuous appellate decisions.

Perhaps this is true, but it misses the point.⁴⁶ It is for reasons of transparency and accountability that judges should address these difficult questions, in public, giving reasons that may be challenged and criticised robustly where they appear to be wrong. It is too easy, and dangerous, for a legislature simply to *declare* that "this evidence is potentially relevant, so let the jury hear it and treat it as they will".⁴⁷ It should not do so.

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(The author is grateful to Shona Wilson for her helpful comments on an earlier draft.)

40 Report paras 3.34-3.43.

41 Paras 1.16 and 3.39.

42 T Lundmark, "Split verdicts in Scotland: a judicial survey" (2010) 14 EdinLR 225.

43 For concerns over the treatment of certain types of previous convictions by lay actors, see S Lloyd-Bostock, "The effects on juries of hearing about the defendant's previous criminal record: a simulation study" [2000] Crim LR 734.

44 Report para 3.35. Cf C Thomas, *Are Juries Fair?* (2010) 35-37.

45 Cf Report para 7.79.

46 It is also contrary to the approach to admissibility adopted in *Thompson v Crowe* 2000 JC 173.

47 Interestingly, the UK Government expressed a preference for a more relevance-based approach to misconduct evidence in English law prior to the passing of the Criminal Justice Act 2003: *Criminal Justice: The Way Ahead* (Cm 5074: 2001) para 3.28. Eventually, a rule of *prima facie* inadmissibility, with various "gateways" to admissibility was introduced (see, particularly, Criminal Justice Act 2003 s 101). Two of these (ss 101(1)(d) and 101(1)(e)) involve the defendant's propensity to commit the offence charged.

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Prescription and Title to Moveable Property

In May 2012 the Scottish Law Commission published its Report on *Prescription and Title to Moveable Property*.¹ The Report provides an overview of this subject and includes a draft Bill. Its central recommendations are that there should be both standard and non-standard schemes of positive prescription for corporeal moveable property in Scotland. In summary, the standard scheme would allow for the acquisition of ownership of corporeal moveable property by means of continuous possession in good faith for a period of twenty years.² This would be complemented by the non-standard scheme, permitting for the acquisition of lent or deposited corporeal moveable property by means of continuous possession or custody for a period of fifty years followed by the holder being unable to contact the owner of the property despite exercising reasonable diligence to endeavour to make such contact.³

There are many points of interest within the Report and the prior Discussion Paper.⁴ This note is principally focussed on two particular points within the current recommendations. It is especially concerned with comparing key provisions of the draft Bill with certain aspects of the existing Scots law of positive prescription in relation to land ownership⁵ and servitudes.⁶

A. GOOD FAITH

Section 1 of the draft Bill presents the standard case in which the new regime would operate. The fact that the entire period of possession would have to be completed in good faith⁷ is a major distinction when viewed in comparison to positive prescription of land ownership and servitudes. The general irrelevance of good faith has been evident from the Prescription Act of 1617 to the present day.⁸ Thus the explicit good

1 Report on *Prescription and Title to Moveable Property* (Scot Law Com No 228, 2012).

2 Draft Prescription and Title to Moveable Property (Scotland) Bill s 1; Report ch 3.

3 Draft Bill s 2; Report ch 4.

4 Discussion Paper on *Prescription and Title to Moveable Property* (Scot Law Com DP No 144, 2010). This is not the first occasion on which the Scottish Law Commission has examined this issue. See *Corporeal Moveables – Usucapion or Acquisitive Prescription* (Scot Law Com Memorandum No 30, 1976). However, the 1976 Memorandum was not followed by any substantive action.

5 Prescription and Limitation (Scotland) Act 1973 s 1.

6 s 3.

7 Draft Bill s 1(1)(b)-(c).

8 *Duke of Buccleuch v Cunynghame* (1826) 5 S 57; W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn by Lord Coulsfield, H L MacQueen et al (2007) 732-733; D Johnston, *Prescription and Limitation* (1999) 287-288. However, good faith may be, or may have been formerly, subsumed within the requirement that the possession must subsist for forty years under the 1617 Act. See Stair, *Inst* 2.12.11. Erskine may also allow for the implicit inclusion of good faith. See Erskine, *Inst* 3.7.15. This is discussed in Johnston, *Prescription and Limitation* 287-288.

faith requirement within the draft Bill is a major departure from Scots law's tradition in this area.

It is acknowledged that good faith is inherently difficult to define.⁹ There is also a potential difficulty contained within the question of whether one party must demonstrate that good faith actively exists or whether it is for the other party to demonstrate its absence.¹⁰ It is also debatable as to whether a higher standard of good faith is required in respect of the active moment at which possession is obtained as opposed to the more passive state of merely retaining possession.¹¹ Issues such as these suggest that the inclusion of a good faith requirement is not something to be undertaken lightly. However, as discussed in paragraphs 3.4-3.6 of the Report,¹² there is a strong case for such a requirement to be recognised in relation to corporeal moveables in order to discourage acts of dishonesty. It is therefore not surprising that some form of this requirement is present in most legal systems.¹³ The inclusion is therefore understandable and is perhaps not the most notable departure from the rules which exist in relation to heritable property.

The fact that land is regarded as not being susceptible to theft¹⁴ is perhaps key to understanding the possibility that good faith may be relevant to corporeal moveable property whilst unnecessary for land. The fact that corporeal moveable property may be stolen renders good faith as being of greater importance, as otherwise positive prescription could function as an incentive to theft.¹⁵ This problem could perhaps be countered by means of a specific rule to exclude stolen property from the recommended regime on the basis of the *vitium reale* principle.¹⁶ However, such a rule might be deemed unfair to purchasers who were in good faith for the duration of the entire prescriptive period. Furthermore, the curing of *vitia realia* is arguably a

9 B Nicholas, *An Introduction to Roman Law* (1962) 123; J A C Thomas, *A Textbook of Roman Law* (1976) 160; M Kaser, *Das Römische Privatrecht*, 6th edn (1968) trans by R Dannenbring as *Roman Private Law*, 2nd edn (1968) 107.

10 H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn (1972) 267 n 4.

11 A high standard of diligence may be required in order to show good faith in certain contexts. See for example: *Rodger (Builders) Ltd v Fawdry* 1950 SC 483. I am grateful to Scott Wortley for discussing this point with me.

12 Report paras 3.4-3.6.

13 German Civil Code (BGB) § 937. See Discussion Paper (n 4) paras 5.1-5.25 for further comparative law.

14 Erskine, *Inst* 4.4.58; Hume, *Commentaries* i,79; G H Gordon, *The Criminal Law of Scotland*, 3rd edn by M G A Christie (2001) para 14-20. This view can be traced back to Roman law: see Gaius, *Inst* 2.51. However, the non-recognition of theft in relation to land in Scotland has recently been questioned. See A Wightman, *The Poor Had No Lawyers* (2010) 23-29 and 251-252.

15 See Report paras 3.4-3.6.

16 This was the rule in classical Roman law: see G.2.45. In relation to Scots law see Mackenzie, *Inst* 3.7.5. Mackenzie states that the *vitium reale* principle prevented the positive prescription of stolen property in the Civil law but that it is unclear whether this would hold in Scots law. With regard to the desirability of the *vitium reale* rule in general see *Corporeal Moveables—Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com Memorandum No 27, 1976) para 64.

key function of positive prescription itself¹⁷ and, so far as possible, this should not be diluted by the creation of exceptions.

There might be more cause for comment with regard to the stipulation that good faith must endure for the entire prescriptive period.¹⁸ This rule contrasts with Roman law which only required good faith at the commencement of possession.¹⁹ It is a fair objection to this recommendation that the need to prove the existence of good faith for the entire duration of the prescriptive period may give rise to evidential difficulties. In order to attempt to mitigate such potential difficulties it would be possible to limit the relevance of good faith to a shorter prescriptive period. This would be supplemented by an alternative longer prescription which would not require good faith. Additionally, a separate provision could be established in respect of cultural property.²⁰

However, there are again good arguments for the recommended rule and these are discussed in paragraphs 3.8-3.11 of the Report. In particular, this rule corresponds with the criminal law provision that a party who takes possession of goods and later learns that they are stolen is guilty of reset.²¹ The rule also finds contemporary support in the DCFR²² and reflects the Scots law tradition of strong protection of ownership.²³ The fact that the good faith requirement is expressed in a more stringent form²⁴ is also sensible as it has hitherto been unclear whether positive prescription of corporeal moveable property has been possible in Scots law.²⁵ It is therefore appropriate that the new rules should be introduced on a basis which serves to protect existing ownership.

B. OPENNESS

The draft Bill includes good faith but omits any requirement that the possession must be carried out “openly”. It demands only that the possession be accomplished “peaceably and without judicial interruption”.²⁶ This indicates a clear departure from

17 *Corporeal Moveables – Usucapion or Acquisitive Prescription* (n 4) para 4.

18 Draft Bill s 1(1)(b).

19 See Gaius, *Inst* 2.43, *J Inst* 2.6.pr and *J Inst* 2.6.4.

20 For an example of such an alternative regime see: C von Bar and E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2010) Book VIII. – 4:101 and 4:102. See also the discussion in A Salomons, “The purpose and coherence of the rules on good faith acquisition and acquisitive prescription in the European Draft Frame of Reference: A tale of two gatekeepers” (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749484. For further comparative law see Discussion Paper (n 4) paras 5.1-5.25.

21 Gordon, *Criminal Law* (n 14) para 20.03.

22 DCFR Book VIII. – 4:101(1)(a).

23 Report para 3.11. For comparison of the Scots law protection of ownership in contrast to other European jurisdictions see Salomons (n 20).

24 The requirement is more stringent in that it demands good faith be present for the entire duration, rather than the mere commencement, of the prescriptive period.

25 Johnston, *Prescription and Limitation* (n 8) 317-318; A R C Simpson, “Positive prescription of moveables in Scots law” (2009) 13 *EdinLR* 445; *Parishioners of Aberscherder v Parish of Gemrie* (1633) Mor 10972; *Ramsay v Wilson* (1666) Mor 9113.

26 Draft Bill s 1(1)(b).

the regime which exists in relation to land and servitudes which requires that the possession be performed “openly, peaceably and without any judicial interruption”.²⁷

Yet, as with good faith, the proposal made in the draft Bill is perhaps not as radical as it might first appear. Indeed, the often quoted statement that possession must be *nec vi nec clam nec precario*²⁸ may not be as significant for the Scots law of positive prescription as might sometimes be thought. The Prescription Act of 1617, which for so long governed the positive prescription of heritable property,²⁹ only required that the possession be completed “peaceably” and “without any lawful interruption”.

Furthermore, whilst the *nec vi nec clam nec precario*³⁰ formula is often stated as being part of the Scots law of positive prescription³¹ it is arguably not strictly part of the classical or later Roman law of *usucapio* or *praescriptio* in respect of land ownership.³² It is dealt with in relation to interdicts to retain or regain possession³³ or else in the context of the imposition of servitudes by reason of prolonged custom.³⁴ The inclusion of this requirement in respect of the positive prescription of land ownership may rather be an aspect of Scots law in which Roman-Dutch influence is manifest.³⁵ It may therefore be suggested that the omission of the requirement of ‘openness’ from the draft Bill is congruent with Roman law and the older Scots law in this area.

The Report refers to contemporary comparative law with regard to the issue of “openness” and notes that the DCFR does not support the inclusion of such a requirement.³⁶ The rationale for this omission is grounded in practical issues of proof and enforceability and thus the omission of “openness” from within the draft Bill is evidence of a pragmatic approach which seeks to create workable rules for practical application.

C. CONCLUSION

The Report and the draft Bill present a workable way forward for a Scots law of positive prescription of corporeal moveables. Yet, it is perhaps inevitable that, as

27 1973 Act ss 1, 3.

28 Gloag and Henderson, *The Law of Scotland* (n 8) 733.

29 The Prescription Act 1617 was only repealed by the Prescription and Limitation (Scotland) Act 1973.

30 Understood as meaning that the possession must be “without force, stealth or licence”. See: Gai, *Inst* 4.150; J *Inst* 4.15.4a.

31 Gloag and Henderson, *The Law of Scotland* (n 8) 733.

32 Nicholas, *Introduction to Roman Law* (n 9) 120-130; Thomas, *Textbook of Roman Law* (n 9) 157-165; W W Buckland, *A Textbook of Roman Law*, 3rd edn by P Stein (1963) 242-252; Jolowicz and Nicholas, *Historical Introduction* (n 10) 151-155; D L Carey Miller, “Property”, in E Metzger (ed), *A Companion to Justinian’s Institutes* (1998) 42 at 55-58; E Metzger, “Actions”, in *ibid* 208 at 220-223; Kaser, *Das Römische Privatrecht* trans by Dannenbring as *Roman Private Law* (n 9) 105-108; P du Plessis, *Textbook on Roman Law*, 4th edn (2010) 184-190.

33 Gai *Inst* 4.150; D 43.17.1.5; J *Inst* 4.15.4a.

34 D 39.3.1.23.

35 J Voet, *Commentarius ad Pandectas* (trans by P Gane, 1955-1958) 44.3.9; R W Lee, *An Introduction to Roman-Dutch Law*, 5th edn (1953) 142.

36 Report paras 3.27-29; DCFR Book VIII. –4:101.

the various helpful examples given in the Report³⁷ and Discussion Paper³⁸ serve to demonstrate, with an area such as this, difficult cases in which both parties are innocent are bound to arise.³⁹ The draft Bill, with its lengthy prescriptive periods and sensibly stringent requirements should make this unlikely. However, as with the equivalent English law in relation to land,⁴⁰ any rule of positive prescription, whether relating to land or moveables, must ultimately be prepared to be the means by which a wrong matures into a right.⁴¹ As is evident from the opening chapters of the Report,⁴² the recommendations are not intended to prevent all future disputes and conclude the jurisprudential debates which underlie this issue. Rather, they are to put Scots law on a footing with other jurisdictions, promote commercial certainty and to end an issue of legal confusion.⁴³

On a technical level, the Report has also to be commended for taking the opportunity to clarify certain points and avoid potential ambiguities that could have arisen from a slavish copying of the rules which already exist in relation to land. In particular it is wise that the Bill utilises the terminology of “acquisition of ownership” rather than that of “unchallengeable title”. This allows for the avoidance of potential ambiguity and academic argument that can arise through a nuanced reading of such parliamentary language.⁴⁴

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EdinLR Vol 16 pp 430-438

Three Recent Cases of Promise

It has sometimes been remarked that Scottish courts seldom have to deal with cases of promise, particularly by contrast with the large volume of contract disputes which come before them. While this may be an accurate long term description, the past couple of years have brought a slight revival in the presentation of promissory arguments before the courts, and three such recent cases in which promise features are discussed below.¹ This may be a mere blip; it may reflect a revival in promissory

³⁷ Report paras 3.8 and 3.35.

³⁸ Discussion Paper (n 4) paras 7.7 and 7.38.

³⁹ Nicholas, *Introduction to Roman Law* (n 9) 129-130.

⁴⁰ Adverse possession and limitation.

⁴¹ K J Gray and S F Gray, *Elements of Land Law*, 5th edn (2008) paras 9.1.6-9.1.12; K J Gray, “Property in a queue”, in G S Alexander and E M Penalver (eds), *Property and Community* (2010) 165 at 188.

⁴² Report chs 1 and 2.

⁴³ Johnston, *Prescription and Limitation* (n 9) 317-318; Simpson (n 24) at 445; K G C Reid, *The Law of Property in Scotland* (1996) paras 565-567; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) ch 7.

⁴⁴ Johnston, *Prescription and Limitation* (n 9) 256-259.

1 A further recent promissory decision, not discussed below, is *Smith v Stuart* [2010] CSIH 29.

scholarship;² or it may represent the increasing desperation of pleaders in times of economic hardship to cast the net wider in identifying potential successful bases for clients' claims. Whatever the reason, these recent promissory cases represent a timely reminder of the existence of this distinctive obligation recognised by Scots law, even if they also demonstrate the difficulty of succeeding in a case based on promise.

The three cases, discussed in turn, are *Regus (Maxim) Ltd v Bank of Scotland*,³ *Sim v Howat and McLaren*,⁴ and *Wylie v Grosset and Greater Glasgow Health Board*.⁵

A. *REGUS*: ALLEGED PROMISSORY UNDERTAKING BY A BANK

This first decision, a judgment of Lord Menzies sitting in the Outer House, raised the central issue of whether the terms of a letter issued by the defenders amounted to a promise by the defenders to pay a sum of money to the pursuers. Lord Menzies thought not.

The facts of the case were that the pursuers were subtenants of a unit at the Maxim Office Park in North Lanarkshire. The landlords of the premises, Tritax Eurocentral EZ Unit Trust ("Tritax"), were to pay the pursuers various costs incurred by them associated with the fitting out of the premises. Prior to the date intended for the pursuers taking occupancy of the unit, the defenders, who, as the landlords' bankers were financing the development of the Office Park, issued a letter to the landlords' solicitors which stated:⁶

It may assist the proposed tenant to have confirmation from us that, on behalf of the landlord (Tritax Eurocentral EZ Unit Trust)... we hold the sum of £913,172 to meet the landlord's commitment to fit-out costs. These funds will be released in accordance with the drawdown procedure agreed between the parties, whereby the proposed tenant's contractors will issue monthly certificates. This is subject always to agreement of wider commercial terms with the incoming tenant.

The defenders subsequently refused to release the sum referred to, arguing that, as the landlords had breached the terms of the funding facility offered to them, they were exercising a right to retain the funds provided under that facility.

The pursuers raised a number of possible arguments supporting the position that the defenders ought to be required to release the funds (including that the pursuers had a third party right to the funds deriving from a contractual agreement between Tritax and the defenders), but only the argument as to the obligation to pay being a unilateral promise made by the defenders to the pursuers is considered here. Of this argument, Lord Menzies commented that "clear words are required to express the promisor's intention to bind himself by an enforceable obligation".⁷ The use of

2 The present author's own recent contribution to such scholarship is the monograph *Promises and Contract Law: Comparative Perspectives* (2011).

3 [2011] CSOH 129.

4 [2011] CSOH 115, 2011 GWD 24-550.

5 [2011] CSOH 89, 2011 SLT 609.

6 *Regus* at para 4.

7 Para 46.

the word “will” in the defenders’ letter (“funds will be released”) did not necessarily indicate obligatory intent on the defenders’ part: the whole terms of the document issued required to be considered. Looking at those terms, his Lordship commented that:⁸

I cannot find such clear words expressing an intention by the defenders to accept a legally enforceable obligation to make payment to the pursuers in respect of fit-out costs “come what may”. Indeed, for the various reasons relied on by senior counsel for the defenders, the terms of the letter suggest to me the contrary, and support the view that the defenders were expressing no such intention. The letter was not addressed to the pursuers, or even to their solicitors. It was clearly contemplated by the defenders that the pursuers would see the letter, and might place such reliance on it as they chose to do. However, it is surprising that if the defenders were expressing an intention to bind themselves by an enforceable obligation they did not address that expression to the beneficiaries of that obligation, or to those acting on their behalf.

His Lordship added that, using Gloag’s categorisation, the letter was “a mere expression of revocable intention”.⁹ He further characterised it as a “comfort letter”, which “may carry a moral responsibility but not a legal obligation”.¹⁰

Lord Menzies makes the important point that, in Scots law, promissory liability is intention and not reliance based. It does not matter that someone may choose to place reliance on words uttered or written by a party; what matters, for such words to be a binding unilateral promise, is the objectively ascertainable intention of the party uttering or writing (as in this case) the words. While a promise by A in favour of B might conceivably be contained in a communication to C, in this case his Lordship thought that such an indirect form of communication mitigated against the relevant words being construed in a way consistent with obligatory intent.

Caution should, however, be shown about one of the passages from Gloag to which his Lordship refers. In the relevant passage, Gloag states that:¹¹

Clearly, unexpressed intention can have no obligatory force. And it is probably equally clear law that the mere expression of an intention to make a promise or an offer, if it is not communicated to the other party concerned, cannot be binding, even although that party may have incidentally become aware of it.

This phrasing suggests that “the mere expression of an intention to make a promise”, if it *were* to be communicated, would be binding; but that cannot be right, as the mere expression of an intention to do something can never be obligatory (intention is one stage removed from obligatory commitment). Gloag is perhaps trying to suggest that it is the act of communication which turns a mere intention into an obligatory commitment. A further word of caution is that communication to “the other party concerned” (i.e. the promisee) is most certainly *not* required in every case, otherwise

8 Para 47.

9 Para 58.

10 Para 53.

11 W M Gloag, *The Law of Contract*, 2nd edn (1929) 16-17.

promises could not be effected in favour of a party not yet in existence (such as an unborn child, or a company yet to be incorporated), yet valid promises can be made in favour of such parties. It is more consistent with this reality that the only strict requirement for a written promise is that communication of the promise *to some other party* is required, not necessarily the promisee: the promisor, A, in communicating a promissory intention to benefit B either directly to B or to some third party C is putting it beyond his power to undo such promissory intention. Of course, in the particular circumstances of a case, it may be that, if a third party was chosen as the recipient of a communication, rather than the alleged promisee, it is reasonable to construe such communication as tending toward the view that all that has been communicated is an expression of intent rather than a promise: Lord Menzies chooses so to construe the facts of the case before him, a construction which seems reasonable so long as based upon an assessment of the whole circumstances and not simply the fact of communication to a third party. Those whole circumstances included the facts that: the defenders merely held the funds on behalf of a third party (the landlords);¹² the words “funds will be released” presupposed that there were funds to be released, which would not be so if the bank quite properly carried out a balancing of accounts;¹³ and the background circumstances to the writing of the letter, which in Lord Menzies’ view meant that his construction of the words used was a “commercially sensible” one.¹⁴

Though Lord Menzies does not discuss in his judgment the idea of a banker’s mandate, the usual terms of such a mandate (under which banks, in making payments to third parties, are treated as merely seeking to discharge the duty owed to their customers rather than as fulfilling any additional conceivable duty towards a third party) would also seem to support the conclusion his Lordship reaches.

In summary, this judgment serves as a reminder of the need, when arguing a case based upon promise, to point to a set of circumstances which, in the round, indicate a clear and unequivocal intention on the part of the alleged promisor to be bound to an obligation. A statement by a bank which is holding a customer’s funds, funds which it intends to release on the customer’s behalf in the ordinary course of things, is unlikely to be considered as demonstrating obligatory intent by the bank. Banks do not generally intend to make promises in favour of those to whom their customers wish to make payment.

B. SIM: LIABILITY OF A NEW PARTNERSHIP FOR THE OLD PARTNERSHIP’S DEBTS

The second case provides us with some interesting remarks by Lord Hodge, sitting in the Outer House, on the correct characterisation of the implied assumption by a new partnership of the duty to pay the old partnership’s debts. Such assumption, uncharacterised until now, is suggested by his Lordship as being promissory in nature.

¹² Paras 49-50.

¹³ Para 50.

¹⁴ Para 52.

The facts were that the pursuer and defenders practised law as partners of the firm of Pattison & Sim in Glasgow and Paisley, the second defender having been assumed as a partner in 1999. A dispute arose out of an agreement which the parties entered into in October 2005, when the pursuer proposed retiring from the partnership. The agreement provided for payment to Mr Sim of £175,000, in monthly instalments of £2,916.66, to purchase his capital and interest in the firm. The defenders initially paid the instalments but, on becoming aware of a potential liability of the firm to the Scottish Solicitors' Staff Pension Fund ("the SSSPF"), a potential liability not discussed or known about by the defenders when they agreed the payments to be made to the pursuer, they withheld further payments. The pursuer sought declarator of the existence of the agreement and payment of the further sums to him.

The pursuer argued that the liability to the SSSPF had not transferred from the partnership of which Mr Sim and Mr Howat were the partners to the new partnership created in 1999 when Ms McLaren was assumed as a partner: as such, it was not a debt of the partnership which should have figured in the calculation of the sums to be made by the defenders to the pursuer. The defenders argued that the liability to the SSSPF was taken on by the new partnership created in 1999.

Following an involved discussion of partnership law, Lord Hodge concluded that the partnership of Pattison & Sim as it was constituted between 1 June 1999 and 31 May 2006 *did* assume responsibility for the prior business debts of the practice, including the contingent liability to the SSSPF, and ordered the case to be put out by order for further procedure.

Having concluded that such an assumption of liability by the new partnership had occurred, his Lordship admitted however that "[t]he case law is not explicit as to the legal mechanism by which the new partnership, B, without any involvement by D [the creditor], assumes responsibility for A's [the debtor's, i.e. the old partnership's] debts".¹⁵ This lack of clarity surrounding the conceptual basis for such an assumption of liability allowed his Lordship to muse what such basis might be, and in so doing to draw a distinction between the approach in English¹⁶ and Scots Law:¹⁷

I think that the effect of the transaction in cases where B has been held to have assumed the liability for D's claim is that A remains liable but B is treated as having made a binding unilateral undertaking to pay the debt due to D. In other words, D can sue B as well as or instead of A. It may be that the historic inability of the English law of contract to enforce such a unilateral promise is, in part at least, an explanation for the differing approach to the issue in the two jurisdictions. The idea of a binding unilateral undertaking is also consistent with the continuing liability of the former partners of the dissolved partnership.

¹⁵ *Sim* at para 33.

¹⁶ His Lordship comments at para 14 that "In English law Mr Sim and Mr Howat as the former partners of the pre-1999 partnership would alone be liable unless Ms McLaren had agreed to accept liability for debts incurred before her assumption as a partner. It seems that there is no presumption that where the whole business of a partnership is taken over by a different partnership without payment therefor, liabilities are transferred as well as assets. . .".

¹⁷ Para 33.

Lord Hodge's statement that the new partnership enters into a binding unilateral undertaking to pay the debt due to the creditor does not make it entirely clear to whom the undertaking is given: is the new partnership promising to the partners of the old partnership to pay the debt due, or is the promise made directly to the creditor? The latter characterisation seems to be that intended by Lord Hodge, as his Lordship continues by saying that the effect of such an undertaking is to give the creditor a right to sue the new partnership as well as the old: that suggests that the promise is made by the new partnership directly to the creditor.¹⁸

Lord Hodge has not infrequently been the source of useful conjectures on rules of Scots law for which there is an uncertain or unexplained basis. His latest conjecture—that the assumption of the debts of an old partnership by a new partnership gives rise to a promise by the new partnership to pay the creditor—seems a practical characterisation of such a legal assumption. The only conceivable objection to this characterisation might lie in the fact that any such promise seems a rather fictional, or at best tacit, one: no express promise to pay the creditor is given in such a case, and thus the determination that one arises is a useful judicial conclusion rather than one supported by actual words or conduct of the promisor. As such, the characterisation of Lord Hodge is rather removed from the usual strict approach of the courts to determining promissory liability (as demonstrated by Lord Menzies in the previous decision). However, given that the assumption by a new partnership of an old partnership's debts has historically been based upon a general legal presumption as to such (displaceable by contrary facts),¹⁹ it does not seem inconsistent that, if any more precise basis for such liability is needed, it may be found in a type of liability (promissory) which, by necessity, is also characterised as a presumption from the facts of the case: if an express promise of indebtedness were present, recourse to the traditional presumption would hardly be required.

It will be interesting to see how this suggestion of Lord Hodge is treated in future decisions. Confirmation by the Inner House as to its soundness would assist a fuller understanding of both promissory and partnership law.

C. WYLIE: LIABILITY OF DOCTOR FOR ALLEGED HARM SUFFERED BY PATIENT'S PARTICIPATION IN A CLINICAL DRUG TRIAL

The argument that doctors undertake not simply to treat patients but to make promises to them is not usually a successful one before our courts. This is especially so in the context of NHS treatment, as the earlier decision in *Dow v Tayside University Hospital NHS Trust* indicates.²⁰ The claim in the present action was equally unsuccessful, even though patient, doctor and hospital were held, by contrast with the *Dow* facts, to be in a contractual relationship.

18 If the undertaking were given to the partners of the old partnership, then the creditor could only get a direct right to sue by means of a *jus quaesitum tertio*, and such a third party right could arise only under contract and not under a unilateral promise.

19 See Law Commission and Scottish Law Commission, Joint Consultation Paper on *Partnership Law* (Law Com CP No 159 and Scot Law Com DP No 111, 2000) para 10.65.

20 2006 SLT (Sh Ct) 141.

The facts of the case were that, between 2002 and 2005, the pursuer participated in a clinical drug trial of a new dopamine patch medication called Rotigotine which it was hoped would be efficacious in treating the symptoms of Parkinson's Disease. The first defender was the principal investigator of the trial, which was conducted at the second defender's hospital. Subsequently to his participation in the trial, the pursuer developed an addiction to gambling which he alleged was caused by the effects of the trial drug. He raised an action in damages (seeking to recover £85,000 lost through his gambling habit), alleging that, while the potential physical side effects of participation in the trial were explained to him in June 2002 when he was assessed for suitability as a participant, the potential for developing addictive behaviour was not discussed.

In his arguments, the pursuer made reference to a "Patient Information Sheet" which he had been given prior to the start of the trial. This document referred to the terms on which compensation would be provided in the event of participants sustaining injury as a result of the trial. The pursuer argued that, in issuing the Patient Information Sheet to him, the first defender (whom failing, the second defender) undertook a unilateral obligation that, in the event that the pursuer sustained injury as a result of participation in the trial, compensation would be paid. This argument was pled, in the alternative, on the basis of an alleged contract between the parties. Morag Wise QC (sitting as a temporary judge) gave judgment for the defenders, and dismissed the action.

On the question of whether the defenders had made a unilateral promise or had entered into a contract with the pursuer, the judge held that the relationship was one of contract²¹ (such must necessarily have been of the nature of a tripartite contract, though the judge does not say as much). Her stated reasons for reaching this contractual conclusion were: (i) the terms of the parties' communications: the patient information sheet was an offer, accepted by the pursuer by his signing the consent form after deciding, on the basis of the information provided, to take part; and (ii) the pursuer had undertaken certain obligations to the defenders, including attendance at the hospital and taking whichever medication was administered, indicating that "the whole arrangement is bilateral and involves the co-operation of the patient in the trial to which he has agreed".²² While the conclusion that the parties were in a contractual relationship seems right on the facts, the first stated reason for so concluding seems to have been arrived at rather precipitously: in order properly to conclude that parties' communications amount to offer and acceptance, a court ought to undertake some consideration of whether such communications disclose any contractual intent on the part of the parties. While such intent was probably present in this case, the matter does not appear to have been considered by the court. The second stated reason certainly provides good ground for dismissing a unilateral promissory analysis, but again it does not confirm whether a contract was definitely intended: merely morally binding relationships may be bilateral, but such bilaterality does not of itself render such relationships contractually binding.

21 *Wylie* at para 20.

22 Para 20.

Having held the parties' relationship to be contractual and not promissory, the judge turned to consider the question of the alleged obligatory nature of the alleged duty of the defenders to compensate the pursuer for his alleged loss. While the judge thought that the terms of the parties' contract were all contained within the Patient Information Sheet and the consent form, this did not mean that everything in these documents was intended to be contractually binding. As to the alleged duty to pay compensation to participants, the judge focussed on the following wording in a section of the information sheet:²³

Compensation for any injury caused by taking part in this study will be in accordance with the guidelines of the Association of the British Pharmaceutical Industry (ABPI). Broadly speaking the APBI guidelines recommend that the sponsor without legal commitment, should compensate you without you having to prove that it is at fault.

The judge, commenting on this wording, opined:²⁴

In my view, giving the words their ordinary meaning, they do not amount to any sort of guarantee that compensation will actually be paid. What they mean is that the issue of compensation will be governed by the guidelines referred to. At its highest, there might be said to be an expectation of compensation in appropriate circumstances but the terms of the Patient Information Sheet do not, in my opinion, go so far as to impose a legally enforceable obligation.

She emphasised that the use of the words "broadly speaking", "recommend", and "should", suggested something falling short of the undertaking of a legally binding obligation, concluding that "an obligation to make payment requires to be in clear terms before it can be enforced... A statement of general intention, or a recommendation, is not enough."²⁵ This conclusion (which would have been equally fatal to a promissory argument, as much as a contractual one) seems an entirely appropriate one given the nature of the wording used on the information sheet, though it resulted in the somewhat unusual result that some of what was contained within that sheet was not contractually binding while some was: it was, in effect, a combination of some legally enforceable terms and some non-binding statements of intention or information. This is hardly a desirable result, as it puts both patients and doctors in the unenviable position of having to attempt to decipher which aspects of their relationship are contractual and which not.

Given the wording used in the relevant documentation, the pursuer's case both on promise and contract was never likely to be an especially strong one. The reference to compensation was hedged about in vague and non-committal language suggesting a lack of any obligational undertaking by the doctor or hospital. Perhaps the pursuer's case was advanced in the terms in which it was because no better ground of liability could be identified: negligence was unlikely here, as, unless a danger of addiction of the sort alleged had been flagged up by previous non-human trials, the defenders

²³ Para 22.

²⁴ Para 22.

²⁵ Para 23.

were unlikely to have been acting without sufficient care so long as the usual clinical procedures were followed; and any insurance which the defenders had taken out under which the pursuer might have claimed as a third party was unlikely to have covered the causally unusual alleged injury of the patient's developing an addictive personality.

D. CONCLUDING REMARKS

As the first and last of the above cases indicates, the difficulty in succeeding in a case of promise based upon the express conduct or words of the defender is often because such conduct or words fail objectively to disclose any promissory intent. Promise is an onerous obligation, and parties (whether commercial parties, doctors, or private individuals) do not typically intend to undertake unilateral undertakings in favour of others, so it should not be surprising that, where promise is argued, the claim often fails. Nonetheless, pleaders should not be deterred from averring promise as one of a number of alleged bases of a claim; the failure to include it in an appropriate case may represent a missed opportunity. As the second of the cases examined indicates, promise may also be *habile* for characterising some types of legal liability which have hitherto not been sufficiently clearly explained in the law. Though parties may not frequently intend to undertake promises in favour of others, there are some cases (such as partnership debts) where it may be entirely appropriate, in the interests of protecting a particular class of person, for the law to deem a unilateral undertaking to have been made, such a unilateral undertaking being most appropriately characterised as a promise.

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The Lodge with Three Names: *Lubbock v Feakins*

There are two types of rectification: one relates to the rectification of defectively expressed documents¹ and the other to the rectification of inaccuracies in the Land Register.² In many but not all cases, rectification of the Land Register follows judicial rectification of a defectively expressed document. As the law stands, even where there is an inaccuracy in the Land Register the Keeper cannot rectify if rectification would adversely affect the registered proprietor in possession, unless the inaccuracy has been caused wholly or substantially by the fraud or carelessness of that proprietor.³ The Keeper is, however, empowered to rectify an inaccuracy in the Register if a court or the Lands Tribunal for Scotland orders her to do so consequent upon the making

1 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8.

2 Land Registration (Scotland) Act 1979 s 9.

3 s 9(3)(a)(iii).

of a rectification order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.⁴ In *Lubbock v Feakins*⁵ the sheriff had to decide whether a lodge which had formed part of an estate had, first of all, been bought and sold in terms of missives, secondly (assuming it had not) whether it had been inaccurately included in the title sheet of that property and thirdly whether rectification of the Register was possible.

A. THE FACTS

In 2002 the owners of an estate at Harwood near Bonchester Bridge, Hawick, decided to sell it under exception of Harwood Mill and the Lodge which was variously known as Clocker Lodge, The Clocker and Harwood Lodge. The Lodge itself was occupied by a former housekeeper in terms of a liferent agreement entered into in 1997. The estate agents who were instructed in the sale prepared particulars with a computerised plan. Instructions were given to the estate solicitors to enter into missives of sale of the estate under exception of Harwood Mill and The Lodge to Robin Feakins. Missives were concluded on 30 August 2002. The subjects were described as part of Harwood Estate and were shown on a plan annexed to the missives. Unfortunately the Lodge actually lay under the red delineating line on the plan with the word “Lodge” being within that red boundary line. On one interpretation of the missives the Lodge was therefore included in the subjects of sale.

However, by a fax of 15 August 2002 the estate solicitors advised Mr Feakins’ solicitors that “Clocker Lodge” and Harwood Mill were not included. The estate trustees executed a disposition in favour of Mr Feakins and the subjects conveyed were delineated and coloured red on a plan annexed. This disposition was then registered in the Land Register on 19 December 2002. The Lodge again lay under the red line on the title plan annexed to the disposition and was therefore included in the title plan in the property section of the title sheet registered under ROX 4028. In fact, the Lodge and the adjacent road were plotted on the title plan as being within the registered subjects. There was no exclusion of indemnity in the property section of the title sheet. The liferenter remained in possession throughout and Mr Feakins took over the insurance policy for the whole estate, which extended to the Lodge, in the belief that he owned it.

In 2003 Mr Feakins took legal advice and removed the Lodge from the insurance cover having been told that he was under no obligation in terms of a liferent to pay for insurance, this being the responsibility of the liferentrix. In November 2009 Mr and Mrs Feakins made a visit to the liferentrix and during the conversation Mr Feakins advised the liferentrix that he owned the Lodge. This came as a surprise to the liferenter who had thought that the property was still owned by the estate trustees. The trustees were advised and their solicitors then raised the matter with Mr Feakins’ solicitors. At the time of the raising of the action and thereafter the liferentrix was and is in occupation and Mr Feakins has again insured the Lodge. In so far as possession is

⁴ s 9(3)(b).

⁵ Jedburgh Sheriff Court 17 Feb 2012, available at http://www.scotcourts.gov.uk/Opinions/AJ99_10.html.

concerned Mr Feakins lived and continues to live in Harwood House and he and his family farm the estate. The road outside the Lodge which is the only access is in daily use by Mr Feakins, his family and other parties and the hedgerows are maintained by Mr Feakins' family. The estate trustees sought declarator that the subjects known as Clocker Lodge with a servitude of access over the adjoining road and a servitude for a septic tank were not included in the property conveyed to Mr Feekins and subsequently registered under Title Number ROX 4028. The second defender was the Keeper of the Registers.

B. THE MISSIVES AND THE DISPOSITION

The subjects were described in the offer of 18 July 2002 as including the whole houses, buildings and erections and the *solum* of any public roads. The qualified acceptance of 29 August 2002 in response to the offer stated that the subjects to be conveyed would be the subjects shown outlined in red on a plan annexed and signed as relative to the acceptance under exception of subjects which had already been conveyed away. No specific mention was made of the Lodge (under any name). There was also an "entire agreement" clause to the effect that the missives would at the date of conclusion represent and express the full and complete agreement between the seller and the purchaser and would supersede the previous agreement if any. The disposition described the subjects in the following terms:

Those parts and portions of the lands and estate of Harwood in the County of Roxburgh as also those parts of the lands of Shankendsiel in said County delineated and coloured red on the plan marked "plan 1" annexed and signed as relative hereto.

There was then a list of exceptions none of which related to the Lodge. The plan attached was a coloured A3 size version of the plan which had already been prepared by the estate agents and was on a scale of 1:25,000. The appellation "Clocker Lodge" was neither mentioned in the disposition nor shown as such on the plan.

C. THE EVIDENCE

Andrew Lubbock, one of the estate trustees, explained the historical background to the ownership of Harwood Estates. He gave evidence to the effect that the Lodge had always been known as Clocker Lodge. Apparently the word "Clocker" is a term for a brooding hen. He could of course give no evidence as to the proper interpretation of the documentation and plans. His view, however, was that looking at the plan attached to the qualified acceptance no-one could actually determine whether the Lodge was on, outside or inside the red boundary line. So far as the plan attached to the disposition was concerned Mr Lubbock's view was that whether the Lodge was included or not was obscure.

The representative of the estate agents explained that the plan prepared by them for the draft sales particulars was merely a computerised draft for marketing based on the Ordnance Survey. Mr Feakins had submitted an offer at a very early stage before any public marketing. He explained that the draft sales particulars did not contain any express mention of the exclusion of Harwood Mill and Clocker Lodge, the view being

taken that such a statement might at that stage deter potential purchasers. He stated that the plan prepared had never been intended for use either in the missives or as an annexation to the disposition. The representative of the estate agents thought it was hard to see what was in and what was out by looking at the plans.

The solicitor who had acted in the sale confirmed that the instructions had been to exclude Clocker Lodge. The solicitor also advised that there had been a number of different versions of the sales particulars. The solicitor's view was that it was not clear from the plan attached to the qualified acceptance whether or not the Lodge was excluded. It was unfortunately not clear whether an A4 or an A3 plan had been the plan originally attached to the qualified acceptance. The solicitor did however have to concede that looking at the missives on the A3 plan it was possible to conclude that the Lodge was included. The solicitor also accepted that the subjects on or within the outer edge of the red line were normally to be regarded as included.

The liferentrix confirmed that the property had been known as "The Clocker" since July 1996 and that it was her that put up the "Harwood Lodge" sign. Until the visit of Mr and Mrs Feakins she had assumed that the estate trustees were the owners. Indeed while she paid for electricity and council tax, external repairs and maintenance were paid for by the trust.

Mr Feakins indicated that as far as he was concerned the price of £2.7 million included the entire estate with the exception of Harwood Mill. He did not believe that it had ever been brought to his attention that the so-called Clocker Lodge was to be excluded. It was his belief that the subjects known as Harwood Lodge were included although he was aware that it was occupied by the former housekeeper to Baroness Elliot. Mr Feakins' recollection was that his solicitor had not taken up with him the faxed letter from the estate solicitors of 15 August 2002 when they stated that neither Clocker Lodge nor Harwood Mill were included. Mr Feakins described himself as a "self made man". He was a man who tried to make sure that he got what he was supposed to get.

The Sheriff was disposed to accept that the fact that the Lodge had different names could have resulted in the confusion. It would not have been necessarily apparent to Mr Feakins that the Harwood Lodge occupied by the liferentrix was the same as the Clocker Lodge referred to in the fax.

Mr Feakins' solicitor confirmed that he had not taken instructions from Mr Feakins on the faxed letter from the estate solicitors of 15 August 2002 since the subjects to be conveyed were those shown on the plan attached to the qualified acceptance. He did not know where Clocker Lodge was but pointed out that the red boundary line went over the footprint of The Lodge and that the red line was within the subjects.

D. THE SUBMISSIONS

The estate trustees did not seek judicial rectification⁶ of the missives and the disposition on the basis that the Lodge, by whatever name, was never intended to be sold. Instead they sought rectification of the Land Register, arguing that in terms

6 In terms of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

of the missives and disposition the Lodge was neither sold nor conveyed. It may be that the chances of rectifying both missives and disposition in terms of section 8 rectification were considered slim.⁷ It was argued that the scale of the plan attached to the disposition precluded an accurate determination of whether the Lodge was included or excluded. Accordingly the disposition had to be regarded against the background of the parties' intention.⁸ The missives contained an entire agreement clause, but counsel for the estate trustees argued that this did not in fact exclude extrinsic evidence as to the actual intention of the parties as a way to interpret the disposition.⁹

It was conceded that the court could not rectify the Land Register against a proprietor in possession unless the inaccuracy (assuming there was one) had been caused wholly or substantially by the fraud or carelessness of the proprietor in possession. Here it was obvious that Mr Feakins was not in physical possession of the Lodge. It was clear that Mr Feakins had natural (physical) possession of the entire estate apart from the Lodge. It was argued that he was in civil possession of the Lodge as the liferentrix was there by his tolerance, and that he was in natural possession of the adjacent road in the only way that a road could be possessed (by usage). There was an obvious difficulty in that the liferent rested on an unregistered minute of agreement to which Mr Feakins was not a party. It could hardly be argued that Mr Feakins was in some way bound by that agreement as a singular successor to ownership of the Lodge although one supposes that if he had notice of the agreement an element of personal bar might arise. The argument which was put to the sheriff was that it was open to the liferentrix to register the minute of agreement and thereafter to ask the Keeper to note her liferent as an overriding interest. If that happened it was argued that Mr Feakins would then become the fiar in which case he would clearly have civil possession. His tolerance of the liferentrix's possession was, it was argued, equivalent to civil possession.

E. THE DECISION

The sheriff summarised the facts pointing out that it was not disputed that a mistake had been made in as much as the trustees never intended to sell the Lodge. Moreover, the estate solicitors had pointed out in the fax of 15 August 2002 that Clocker Lodge was not included. The Sheriff, however, did point out that the exclusion of Clocker Lodge was not actually specified expressly in the missives nor the disposition and everything was left to an interpretation of the plans attached to both these documents. The sheriff accepted that the plan in the property section of the title sheet included the Lodge and the adjacent road.

The sheriff narrated the terms of section 9 of the 1979 Act in full and then went on to consider whether there was an inaccuracy in the Register. The evidence in relation

7 See the comments in G H Gretton and K G C Reid, *Conveyancing*, 4th edn (2011) para 20-03.

8 See *Holdsworth v Gordon Cumming* 1910 SC (HL) 49

9 Reference was made to *Macdonald Estates plc v Regenesys* (2005) *Dunfermline Ltd* 2007 SLT 791 at 825.

to the plan attached to the disposition only came from witnesses who were actually involved in the transaction none of whom could be said to be experts in the reading or examining of plans. Some witnesses had referred to a miniscule kink or indentation in the red line at the point where the Lodge lay. Most of the witnesses saw the kink as affecting the road rather than the Lodge. The sheriff pointed out that ownership of the road was not the issue. The sheriff accepted the evidence of the selling estate agent and the solicitor who acted for Mr Feakins to the effect that the Lodge was either under or within the red line. In dealing with the proposition that (assuming the disposition plan was ambiguous) reference could be made to the plan attached to the missives the difficulty was that no-one seemed clear as to which plan was attached to the qualified acceptance. Indeed it seems as though the original plan was not produced. Nevertheless, the plans which were produced were no improvement on the plan attached to the disposition. Assuming that both disposition and missives plans were ambiguous the Sheriff then referred to the entire agreement clause in the missives, and held that this precluded establishing the objective intention of the parties other than by looking at the missives themselves. In any event there was no common understanding between the parties in relation to the Lodge.

Perhaps the most challenging issue was whether or not Mr Feakins enjoyed civil possession of the Lodge. The concept of a proprietor in possession for the purposes of rectification has of course caused difficulty.¹⁰ It was conceded that what amounted to possession had to be tailored to the nature of the subjects. In looking at possession of a farm or a whole estate one would not necessarily expect actual daily possession of every square metre. Indeed, in *Tesco Stores Limited v Keeper of the Registers of Scotland* it was argued that possession of the majority of an estate was equivalent to possession of the whole. In this case however it was conceded that any possession on the part of Mr Feakins had to be civil possession standing the liferentrix's occupation.

The sheriff held that Mr Feakins could be construed as a proprietor in possession of the estate including the Lodge and listed certain facts and circumstances which "had a bearing" on the issue of possession. These facts were as follows: (a) Mr Feakins acquired the estate, lived in the main house, farmed the estate and was in possession of the estate taken as a whole; (b) there were 13 individual houses or cottages on the estate quite apart from the Lodge; (c) the previous insurance cover taken out by the estate trustees was continued by Mr Feakins and this included the Lodge; (d) Mr Feakins took advice from his solicitor as to his responsibilities to the liferentrix, something he would not have done if he had not thought he was the owner; (e) having received legal advice to the effect that as owner he did not have liability for the insurance he cancelled the insurance cover but allowed the liferentrix to remain in occupation; (f) having seen the minute of agreement on which the liferent was based and being unsure of the situation Mr Feakins reinsured the Lodge in case he was bound to do so; (g) the most prominent natural boundary of the Lodge was the hedge bounding the road and the natural boundary of the estate was the road; (h) the liferentrix never herself believed that she owned the Lodge; (i) the estate trustees had

¹⁰ See *Kaur v Singh* 1998 SC 233; *Tesco Stores Limited v Keeper of the Registers of Scotland* 2001 SLT (Lands Tr) 23.

no title to the Lodge and so the liferentrix could not have occupied it civilly on their behalf; (j) it was not disputed during the proceedings that Mr Feakins had title to and possession of the road bordering the Lodge; (k) the Lodge lay between the road bounding it and the remainder of the estate, and Mr Feakins was in natural possession of the road and the estate which surrounded the Lodge.

It is perhaps significant that none of the factors listed by the sheriff in his judgement are adverse to the notion that Mr Feakins had civil possession of the Lodge. There would, I think, have been little doubt that the liferentrix herself believed that the owners were the estate trustees at least up to the time of Mr and Mrs Feakins' visit to her. Another point against the proposition that Mr Feakins had civil possession of the Lodge is that the liferent, so called, was constituted in a minute of agreement between the estate trustees and the liferentrix; Mr Feakins obviously was not a party to the original agreement but more importantly neither was he a party to any new agreement with the liferentrix at the time of his purchase. Accordingly the liferentrix's right to occupy depended on the minute of agreement. Although the right of occupancy was referred to as a liferent it only created a personal right of occupancy which would not have bound singular successors of the estate trustees.

F. CONCLUSIONS

Two important issues arose in this case. In the first place there was the question of the extent of the subjects bearing to be conveyed. In the second place there was the question of whether or not rectification of the Register was possible which in turn depended on whether or not Mr Feakins was to be regarded as a proprietor in possession. In relation to the first question it is perhaps odd that no expert witness was called by either side in relation to the interpretation of the plans and in particular the question of whether it was the outer edge of a red line or the inner edge which was the legal boundary. Some guidance is offered on the Registers of Scotland website.¹¹ What is said there is that "occasionally" red edging is applied "externally" to the boundary defining the subjects. This could happen where the red edge covers another colour reference or important detail near to a boundary. For this reason it should not apparently be assumed that the registered extent includes up to the outer edge of the red but rather the registered boundary is the line (firm or pecked) to which the red line has been applied. Given that the guidance uses the word "occasionally" the assumption presumably is that in the vast majority of cases it is the outer edge of the red line which is the legal boundary but this is not stated in terms. In some cases there are notes in the property section which indicate that the boundary is the outer face, inner face or mid line of a particular boundary feature. Such a statement would override any presumption to be applied arising from the width of the red line. It seems to have been accepted in the case that it was the outer edge of the red line which fixed the legal boundary. The question of rectification would only have arisen if it had been accepted there was an inaccuracy in the Land Register in the first place. Since the

¹¹ See Registers of Scotland, *Agency Conventions Regulating Plans References*, available at www.ros.gov.uk/pdfs/plans_ref.pdf.

sheriff did not accept that there was an inaccuracy the question of possession was actually academic.

Logically however certain things are clear: (a) Mr Feakins did not have natural possession of the Lodge at any time; (b) the occupancy arrangements set out in the minute of agreement did not bind Mr Feakins who could presumably have demanded that the liferentrix vacate; (c) since Mr Feakins' claim that the liferentrix was possessing for him depended on some legal relationship between her and him he could not be said to be in civil possession.

The sheriff took the view that at the point the liferentrix was advised of Mr Feakins' ownership claim she possessed by way of the licence, permission or more appropriately the tolerance of Mr Feakins and that tenuous link was enough for her possession to be regarded as civil possession for him. It would have to be said in support of that theory that even where natural possession is claimed the extent of that possession can be very slight indeed.¹² However, where civil possession is concerned it is not the extent of the possession which is relevant; it is the legal nature of that possession and the need for it to be dependent on a more substantial right vested in another person such as ownership. If one were to regard the liferentrix here simply as a squatter but nevertheless someone who might be said to have a moral claim to remain in possession which Mr Feakins was prepared to respect it is difficult to see how that could have amounted to civil possession.

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Right of Appropriation and Legal Change

The EC Directive on financial collateral arrangements ("FCD")¹ allowed Member States to introduce legislative provisions to permit,² on the occurrence of an enforcement event and subject to specific conditions set out in the security document,³ the collateral taker to realise the financial collateral by way of appropriation.⁴ This was an attempt to improve the legal certainty of financial collateral arrangements and to ensure that certain provisions of insolvency law that would inhibit the enforcement procedures did not apply to such arrangements.⁵

12 *Hamilton v McIntosh Donald Limited* 1994 SLT 793. See R Rennie, "Possession: nine tenths of the law" 1994 SLT (News) 261.

1 Council Directive 2002/47 on financial collateral arrangements OJ 2002 L168/43.

2 Art 4(3) FCD. It should be noted that in implementing the Directive, no Member State made use of the option not to recognise appropriation as a method to enforce financial collateral.

3 That is, the parties' agreement on enforcement by appropriation and on valuation of the financial instrument (art 4(2) FCD).

4 Art 4(1) FCD.

5 FCD, recital 5.

The new method of enforcement⁶ involves the acquisition of outright ownership over the secured asset and primarily aims to protect the interests of collateral takers⁷ when illiquid market conditions make it very difficult to realise collateral by the usual means of sale.

The FCD was implemented in the United Kingdom by the Financial Collateral Arrangements (No. 2) Regulations 2003 (FCAR).⁸ Regulation 17 FCAR introduced a right of appropriation for the collateral taker, providing that:

..where a legal or equitable mortgage is the security interest created or arising under a security financial collateral arrangement on terms that include a power for the collateral-taker to appropriate the collateral, the collateral-taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts.

The possibility of enforcing security interests by unilateral act of appropriation without a court order⁹ has been an absolute novelty in English law and a departure from the rule against clogs on the equity of redemption.¹⁰ With recourse by appropriation, the collateral taker's proprietary right is not in fact limited any more by the existence of the collateral giver's (residual) proprietary right to the return of the identical assets¹¹ on the discharge of the collateralised obligation.¹²

A. LEGAL UNCERTAINTY

The legal boundaries of the remedy of appropriation implemented under FCAR have recently been tested in *Cukurova Finance International Limited and another v Alfa Telecom Turkey*,¹³ a decision of the Privy Council on preliminary issues

6 The possibility of enforcing security interests by way of appropriation was introduced only in the final version of the FCD by the European Parliament, amending the Commission's original proposal. See "Report on the Proposal for a European Parliament and Council Directive on Financial Collateral Arrangements" (COM (2001) 168. C5-0131/2001 .2001/0086(COD)), amendment no 13, 23/11/2001, OJ C E/2002/177/282.

7 And, indirectly, the interest of financial stability.

8 SI 2003/3226.

9 That is, on different grounds from the mortgagee's right of foreclosure where a court order is necessary. See W Clark, *Fisher and Lightwood's Law of Mortgage*, 13th edn (2010) ch 32.

10 "Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own": *Marquess of Northampton v Pollock* (1890) 45 Ch D 190 at 215 per Bowen LJ. Some of the key judgments on the specific (non-renounceable) mortgagor's right to the return of the mortgaged asset upon discharge of the secured obligation are *Newcombe v Bonham* (1681) 22 ER 1063; *Spurgeon v Collier* (1758) 28 ER 605; *Vernon v Bethell* (1761) 28 ER 838; *Northampton v Pollock* (1890) 45 ChD 190; *Samuel v Jarrah* [1904] AC 323; *De Beers v British South Africa Company* [1912] AC 52 and *Fairclough v Swan Brewery* [1912] AC 565.

11 Although the return of the collateral assets *in specie* is questionable after the decision in *Ellis & Co's Trustee v Dixon Johnson* [1924] Ch 451 where it was held that this was not necessary where the collateral assets consist of securities available in the secondary market.

12 See *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 AC 295 at 311 per Lord Templeman.

13 [2009] UKPC 19.

arising in the course of litigation¹⁴ before the British Virgin Islands courts (“BVI”) between Cukurova Holding AS¹⁵ and its wholly owned subsidiary Cukurova Finance International Ltd¹⁶ (“Cukurova”) and Alfa Telecom Turkey Ltd¹⁷ (“Alfa”).

The proceedings considered whether Alfa could enforce its right of appropriation on the shares provided by Cukurova to secure sums advanced under a loan facility. Two years after the delivery of the certificates and blank transfer forms, Alfa alleged that a number of events of default had occurred and, in demanding immediate payment of the balance of the loan plus interest, sought orders requiring it to be registered as holder of the shares. The controversy centred on whether the charges governed by English law¹⁸ (equitable mortgages) and the right of appropriation could be effective under FCAR, even if Alfa had not become the registered (legal) owner of the shares.

The BVI High Court,¹⁹ having received expert evidence from Lord Millett on Alfa’s behalf and from Professor Ross Cranston (now Cranston J) on behalf of Cukurova, established that this was not possible because the concept of appropriation under FCAR must comply with an autonomous meaning deriving from the implementation of the FCD, which should be capable of uniform application among the Member States.²⁰ As the distinction between legal and equitable mortgage makes sense only with reference to English principles of property law, appropriation may occur only when the collateral taker becomes the full legal owner of the shares and not just the equitable owner. A written notice from an equitable mortgagee (Alfa) was not, therefore, considered to be an effective method of enforcing financial collateral, as “one must have some overt, unequivocal action by a lender, which has the effect of both destroying the equity of redemption and of vesting all the legal and equitable rights in the security in him for the right of appropriation to be validly exercised”.²¹

The Eastern Caribbean Court of Appeal²² overturned the BVI High Court’s decision and took the view that registration was not necessary, as the written notice to appropriate the charged shares by the collateral taker had extinguished the equity of redemption. Following a pragmatic interpretation of the FCD, Barrow JA found it permissible to interpret the language of a European Directive to accommodate a divergent English legal concept and stated that, as “an equitable mortgagee may foreclose and become the absolute owner of the beneficial interest while the

14 A comprehensive analysis of the discussion on preliminary issues in *Cukurova* is offered by G Yeowart, “Privy Council upholds appropriation of shares” (2009) 27 JIBFL 384; G Yeowart, “Remedy of appropriation upheld by Privy Council” (2009) 4 LFMR 339 and Lord Millett, “The remedy of appropriation under a share mortgage” (2008) 4 LFMR 333.

15 A private company incorporated in Turkey.

16 A private company incorporated in the BVI.

17 A private company incorporated in the BVI, wholly owned by the Alfa Group, a Russian conglomerate.

18 BVI law charges were also granted in favour of Alfa, but the litigation in *Cukurova* related only to the English charges.

19 BVI Claim No. 072 and Claim no. 119 of 2007 (judgment delivered 16 Nov 2007).

20 Para 68.

21 Para 77.

22 *Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd* HCVAP 2007/027 (judgment delivered 22nd April 2008).

mortgagor continues to hold legal title”,²³ the notion of full ownership under FCD should include the absolute ownership of the beneficial interest. In other words, if the division of ownership interests in collateral can continue after foreclosure, there is no reason why it should not be allowed to continue after appropriation. A different interpretation would be contrary to the purpose of FCD of creating the remedy of appropriation as a self-help remedy because it would subject the right of an equitable mortgagee to the willingness of the mortgagor’s registered agent to register the transfer, or possibly to a court order. Above all, “an equitable mortgage would be practically worthless as security for a financial collateral arrangement because it would make no business sense to take an equitable mortgage as security”.²⁴

In the end, the Privy Council upheld the Court of Appeal’s decision and held that the notion of appropriation under FCAR must be construed in order to give effect to the FCD’s general scheme and purpose²⁵ so that the collateral taker must have the means of rapid and non-formalistic enforcement in compliance with national law.²⁶ This reasoning allowed the Privy Council to conclude that for a valid appropriation it was not necessary for Alfa to become the absolute legal owner, the registered holder of the shares. In many cases, their Lordship reasoned, “where the registrars of charged shares had no reason to make difficulties about registration, it would be easy (and no doubt convenient) for the collateral taker to become the registered owner either just before or soon after exercising its power of appropriation. But it is not necessary”²⁷ according to the correct interpretation of the FCAR, and any alternative interpretation would defeat the call for rapid and informal enforcement of financial collateral set out in FCD.

In short, the Privy Council concluded that the idea that appropriation cannot take effect in equity and that the legal title must vest for appropriation to be effective is flawed. The notion of full ownership according to the Community meaning is capable of referring to full or absolute ownership of the beneficial interest and enforcement of financial collateral must also be possible for the equitable mortgagee, “provided the existence of an overt act evincing the intention to exercise a power of appropriation [is] communicated to the collateral provider”.²⁸

B. LAW REFORM

With the enactment of the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010,²⁹ regulation 17 FCAR has been significantly amended. The right of appropriation has been expanded

23 *Alfa* at para 36, citing in support *Marshall v Shrewsbury* (1875) LR 10 Ch App 250 at 254 per James LJ.

24 *Alfa* at para 31.

25 See FCD, recital 17.

26 *Cukurova Finance International Limited and another v Alpha Telecom Turkey Ltd* [2009] UKPC 19 at para 32.

27 *Cukurova* at para 34.

28 *Cukurova* at para 36.

29 SI 2010/2993. This is the legislation implementing EC Directive 2009/44/EC OJ 2009 L146/37.

to any security financial collateral arrangements (rather than, as previously, only to security that was in the form of a mortgage) and some of the themes debated in the preliminary issues in *Cukurova* have been specifically addressed. In particular, regulation 17(2) FCAR provides that once the power to appropriate the financial collateral has been exercised, the equity of redemption of the collateral-provider will be extinguished and all legal and beneficial interest of the collateral-provider in the financial collateral will vest in the collateral taker.

The drafting of this provision has rightly been questioned, since reference to “the equity of redemption” overlooks the fact that some security interests such as charges are created without any transfer of title or possession to the beneficiary³⁰ and, therefore, they do not involve any right to a retransfer of title upon discharge of the secured obligation.³¹

However, other recent criticisms are less valid. In the light of the Privy Council decision in *Cukurova*, it is not for example clear why regulation 17(2) FCAR would override section 770 of the Companies Act 2006,³² allowing the third party chargee to be the legal owner of the shares automatically upon appropriation. Regulation 17(2) FCAR simply reiterates the view endorsed by the Privy Council in *Cukurova* according to which, when the collateral taker exercises his right of appropriation, any residual proprietary right of the collateral provider will be extinguished and, being the absolute beneficial owner, the collateral taker will be entitled to perfect its security by obtaining registration.

Moreover, the argument that the remedy of appropriation would not be available under regulation 17(2) FCAR in the case of securities held on an intermediated basis because the collateral provider can only grant an equitable interest and not legal title is also not convincing.³³ Regulation 3 FCAR requires that to qualify as a “security financial collateral arrangement” the collateral is “delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on its behalf”. This means that, with the possible exception of certain types of floating charges,³⁴ any charge that confers on the collateral taker control of intermediated securities allows him, on the default of the collateral giver, the right of appropriation by crediting the assets to the account maintained by the intermediary in its name. Given that transfer of ownership of intermediated securities is made by book entry transfer and not by registration,

30 *Re BCCI (No. 8)* [1998] AC 214 at 226 per Lord Hoffmann.

31 In the words of the Law Commission, *Registration of Security Interests* (Law Com CP No 164, 2002) para 2.14, the “main difference between a mortgage and a charge is that a mortgage involves a conveyance of property, which is subject to a right of redemption, whereas in the case of a charge there is no conveyance and the chargee is given rights over the property as security for the loan”. The applicability of the rule against clogs on the equity of redemption to floating charges is discussed in *De Beers Consolidated Mines v British South Africa Company* [1912] AC 52 at 73 per Lord Gorrell.

32 L Chan Ho, “The Financial Collateral Directive’s practice in England” (2011) 26 JIBLR 151.

33 Chan Ho (n 32) at 171.

34 See A Zacaroli, “Taking security over intermediated securities: chapter V of the UNIDROIT (Geneva) Convention on Intermediated Securities” in L Gullifer and J Payne (eds), *Intermediated Securities. Legal Problems and Practical Issues* (2009) 167.

the distinction between legal and equitable title is, in this case, simply not relevant in ensuring the rapid and informal enforcement of the collateral arrangement by appropriation.

C. CONCLUSION

One striking feature of the saga inherent in the reception of the right of appropriation into English law is that the final outcome arising from the Privy Council judgment in *Cukurova*, together with the recent changes in regulation 17 FCAR, conflicts with practical commercial expectations (Alfa could not appropriate the shares because it could not deal with them). It favours doctrinal solutions based on path dependency (Alfa could appropriate the charged shares because it had the absolute beneficial ownership). Contrary to the traditional tendency of the English courts to support commercially sound results rather than doctrinal virtuosity,³⁵ the conclusion that it is not necessary for a valid appropriation for a collateral-taker to become the registered owner of shares testifies that, even when legislation is imposed from Europe, the erosion of equity in everyday commercial transactions should not be taken for granted.³⁶

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³⁵ Famously, Bramwell LJ commented that “I do not desire to find fault with various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions” (*New Zealand and Australian Co. v Watson* (1880-1881) 7 QBD 374 at 382). See also *Re BCCI (No. 8)* [1998] AC 214 where Lord Hoffmann held that charge backs may take effect as a charge and stated that “the courts should be very slow to declare a practice of the commercial community to be conceptually impossible” (at 228).

³⁶ On the academic debate on these issues, see R Goode, “The shaping of commercial law” in *Commercial Law in the Next Millennium, The Hamlyn Lectures* (1998) 14; Lord Millett, “Equity’s place in the law of commerce” (1998) 114 LQR 214 and W Goodhart and G Jones, “The infiltration of equitable doctrine into English commercial law” (1980) 43 MLR 489.